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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1541

ARAM AJAMIAN,

Petitioner,

v.

THE TOWNSHIP OF NORTH BERGEN, and
MILTON J. MUSS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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No. .....

ARAM AJAMIAN,

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v.

THE TOWNSHIP OF NORTH BERGEN, and
MILTON J. MUSS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, Aram Ajamian, hereby petitions for a writ of certiorari to review the decision of the Supreme Court of the State of New Jersey denying to Petitioner a judgment to vacate the proceeding of the defendant Milton J. Muss acting building inspector and allow the building to be opened up, and thereafter to proceed, if he still so desires, to give Petitioner notice and hearing before the Commissioners according to the statute of New Jersey and the Building Code of the Township of North Bergen, the acting building inspector having forceably removed the tenants of the brick apartment building and closed up the apartment building by 24 hour notice, without any opportunity to either the tenants or petitioner to

be heard and has kept the apartment building closed to date—a period of over three years, without a hearing to the Petitioner.

Opinions Below

The Per Curiam opinion below is reported 103 N. J. Super. 61, 246A(2) 509 August 30, 1968. It is Appendix A. Appendix B consists of the opinion of the Appellate Division of the Superior Court of New Jersey: 107 N. J. Super. 175, 257 (A2) 69 October 2nd, 1969 stating "The Per Curiam judgment is affirmed essentially for the reasons stated by Judge Lynch."

Jurisdiction

The order sought to be reviewed was made and entered on February 10, 1970. The petitioner filed with the Supreme Court of New Jersey two different sets of briefs—one the regular brief and the other set the reason why he had a right to appeal as a matter of right because of the Constitutional questions involved and raised in both Courts below and showing the Constitutional questions raised. Petitioner also filed the required number of the transcripts of the testimony that took four days, all at the same time and within the prescribed time.

Respondents made a motion to dismiss the appeal stating that there was no Constitutional question involved. In opposition to this motion petitioner filed a third set of briefs showing that the opinion of the Court below 103 N. J. Super. 61, 246 (A2) 509 August 30, 1968, directing the Court's attention to sub-divisions appearing in the synopsis under Constitutional Law 10, 11, and 17 as stated in this petition for certiorari.

The Supreme Court, nevertheless entered a judgment against the petitioner on February 10, 1970 not yet re-

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ported stating as follows: "This matter having been duly presented to the Court, it is ordered that the motion to dismiss appeal is granted" appendix C. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U.S.C. Sec. 1256 (3).

Questions Presented for Review

1. Whether the appellate tribunals of a State including the trial Court which is sitting as appellate tribunal in case of in "lieu of prorogative writ" deprive a party of his right to trial by jury as guaranteed by the United States Constitution and the New Jersey Constitution of 1947.

2. Whether the forceable closing of an apartment building by 24 hour notice without a hearing or an opportunity for a hearing and keeping it closed for over two years resulting in destruction by vandals and thieves stripping the inside and outside, so that the building has to be razed to the ground constitute taking of private property contrary to the provisions of the Amendment V and Amendment XIV of the United States Constitution.

3. Whether the requiring of tearing down the walls and ceilings of each room to put in larger electric cables in place of the cables already in the walls and ceiling put there while the walls and ceilings were being constructed at the time the building was built and complying with the then code and the Court having decided that the National Building Code which embraced the Electrical Code, adopted by the Township of North Bergen in 1966 did not apply to the plaintiff's building because the code specially stated it was to be applied only to buildings after its adoption and the Court having decided this building was built long prior to said code and the present electrical cables never having caused fire since the construction of the building,

is a retrospective act or proceeding impairing the obligation of contract and vested right violative of the due process clause of the Fifth Amendment and XIV Amendment, Ar. 1 Sec. 9, U.S.C.A.

4. Whether petitioner was denied equal protection of the law as guaranteed by Article I, Par. 1, Subsec. 1, Par. 10, New Jersey Constitution of 1947, Amendment XIV of the United States Constitution by the manner of closing up only certain building of the same class and condition and not every one built before 1966 when the National Building Code was adopted by the Township of North Bergen, New Jersey.

5. Whether petiitoner was denied due process of law guaranteed contrary to the provision of the "Amendment XIV" of the United States Constitution by forcibly closing up of the apartment building and thereby causing destruction of the building by 24 hours notice without an opportunity to a hearing or being heard.

6. Whether the totality of the effect of the New Jersey Administrative proceeding and the failure of the New Jersey Courts to scrutinize and relieve the impact of it deprive petitioner of property without due process of law.

Constitutional Provisions Involved

Amendment V, United States Constitution: "* * * nor shall private property be taken for public use, without just compensation."

Amendment VII, United States Constitution: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the common law."

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Amendment XIV, United States Constitution, Sec. 1, Clause 3: "No State shall * * * nor shall any State deprive * * * nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment XIV, United States Constitution, Sec. 1, Clause 2: "* * * nor shall any State deprive any person of property, without due process of law * * *"

United States Constitution, Art. 1, Sec. 9.

New Jersey Constitution of 1947, Art. 1, Sec. 9: "The right of trial by jury shall remain inviolate: * * *"

New Jersey Constitution of 1947, Art. 1, Par. 1, Subsec. 1, par. 10: "All perscns are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." (Note: Subsec. 1, Pars. 31-70, of this same Art. 1, Par. 1, covers due process.)

Statement of the Case

The issue of restraint sought in November 1966 whether or not this Court desires to pass upon it is academic and would be of no help to the petitioner now, but only for precedent. The plaintiff's building still remains closed and will have to be demolished, were petitioner required to tear down the walls and ceilings of each room to put in larger cables in place of the cables already in the walls and ceilings put there while the walls and ceilings were being constructed at the time the building was built and complying with the then code. But, this was not the issue the Court was to pass upon. The Court was to pass upon and decide if the proceeding of the Building Inspector should be set aside to close the building, because he had not complied with the requirements of the New Building Code in regards to notice and opportunity to be heard,

Code in regards to notice and opportunity to be heard, depriving plaintiff of due process of law, by his summary action on November 9, 1966 of closing the building by 24 hour notice given to this plaintiff and each of the tenants of the apartment house building, and a request that the proceeding of the Building Inspector be set aside closing the building, and that the plaintiff be allowed to open up the closed building, and thereafter, the Building Inspector, if he still wanted to proceed against the petitioner to give the petitioner the notice and hearing before the Commissioners as the code required him to do. After the determination by the Commissioners, if it should be against the plaintiff, he would be given 30 days opportunity to comply. The plaintiff thereafter has several choices one of which is to do nothing and allow the Township to demolish the building and sue the Township for damages to be assessed by a jury, which right the Court, by its decision, took away from this plaintiff. *Hutton* v. *Camden*, 39 N.J.L. 122, 23 AM, Rep. 203 (1876).

The Trial Court's opinion (41a) states: "to account for the same" and "to show that the alleged nuisance was not one in fact" neither of which was necessary to be shown by the "in lieu of prorogative writ" as stated in *Coast* v. *Borough of Spring Lake*, 56 N.J.E. 615, 623, 624, 36 A 21 affirmed, 58 N.J.E. 586, 47 AT 1131, E & A 1897 "and it is not a fact that otherwise any public officer by pretense of summary abatement, throw person into "in lieu of prorogative writ", forcing the person to be deprived of guaranteed right of jury trial. "If the Court's decision were to remain, this plaintiff would be deprived of jury trial." Everything was taken care of except the electrical work (411a to 15) which could not possibly be done except by the complete destruction of the apartment house.

In any event the building inspector could not summarily abate a nuisance when the Township had given such power only to the Board of Health, Court's opinion (49a).

The Court having decided that the building inspector had not complied with the building code (35a) in not

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giving notice and hearing to plaintiff, said fact being admitted by the defendant, should have set aside the building inspector's proceeding in closing up the building summarily for the purpose of abating a nuisance.

The Court having decided that the National Building Code which embraced the Electrical Code, adopted by North Bergen in 1966, did not apply to this plaintiff's building because the code specifically stated it was to be applied only to buildings after the adoption of the code, and the Court having decided said building was built long prior to said code, nevertheless found the cables in the walls (102a-23; 103a-1 to 13; 104a, 16-17; 107a-14; 253a) not complying with the National Building Code (185a, 13-1; 186a-24) nevertheless should be made to comply with said code by tearing the building apart as above stated.

The building had four children, not many, 2 on the first floor and 2 on the second floor. Testimony as to many were in the past (330a-16; 335a-17). The order complained of in the basement apartment came from the next neighbor at the time of inspection, opening up the sewer, which flooded the building's cellar (419a-6; 421a-6). This was the only bad apartment and therefore the only one of which pictures were taken (391a-20). The building inspector did not know of the heating condition on November 9, 1966. An order for the correction of this condition had been before this date. The building inspector found out about this condition after this date, when it was fixed. None of the notices stated that there was no heat, nor did the action in the Criminal Court against this plaintiff include that there was no heat, and the cables never causing fire or fire hazards, since the construction of the building and requiring great expense to tear down the walls and ceiling and reconstruct thereof, to put in the larger cables, should not be the subject of summary abatement as a nuisance by the building inspector as retrospective act (Court's Opinion, p. 10) when all of the work had been done (251a-21 to 25; 254a-2; 512a, 1-9). All houses built

after 15 or 20 years ago, should be rewired as above stated, resulting in rebuilding new walls and ceilings, and judicial notice that this includes 90% of buildings, none of which are required (523a to 524a-8; 529a-12 to 530a-5; 535a-18) and the building inspector refused to give plaintiff's electrician a permit to do work to satisfy the code in respect to the meter box, which did not require reconstruction (516a-1 to 562a-19) of the walls, but still all the wires in the wall would be required to satisfy the new adopted 1966 code, which means reconstruction of the entire building as the walls and ceilings would have to be ripped down and reconstructed new (561a-1 to 564a-1), and the removal of the zip cords, which were minor items which plaintiff agreed to do, would have satisfied the new adopted code completely (564a-17 to 565a-1) and there being no air conditioner that really uses up great amounts of electricity (575a, 9 to 14). This electrical system at one time even carried the load of X-ray machine, machine now no longer exists (608a-4) and the electrical inspector's statement as to a lot of 30 ampere fuses being just from his memory two years ago, having made no notation attached to exhibit from which he refreshed his other statements (591a-13; 592a-19; 601a-5 (Exh. D 16)). The electrical inspector's attempts to say there were no wall switches when actually in fact there were in every room of the apartments (568a-5 to 572a-18). The electrical inspector's testimony that he did not discuss as to what he was going to testify to with his lawyer (605a-14). The National Electrical Code which has been adopted by the National Building Code in 1966, stating, for buildings after its adoption in 1966, and if this were not a fact would be unconstitutional as a retrospective law, partaking that of ex post facto as retroactive or retrospective law forbidden by the U. S. Constitution (523a-23; 524a-8; 529a-12 to 530a-5). The Court still refused to set aside the proceeding of the building inspector in summarily closing of the building.

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The Court should not have marked (Exhibits D-2; D-9; D-10; D-11; D-12; D-13; D-14 and D-1) into evidence when someone showed the building inspector the pictures and the date when it was taken (369a-14), the statement of someone, no name given, is hearsay and admitted over plaintiff's objection (363a-4 and 374a-23) and also should they not have been excluded because they represented only the basement apartment and no pictures were taken of the rest of the apartments when the building inspector wanted all the apartments vacated, contrary to the Board of Health inspector who wanted only the basement and first floor vacated (391a-20 to 392a-19).

The Court should not have considered any testimony regardless of the fact that the Court heard such testimony as to whether or not there was a nuisance which gave the building inspector the right to summarily abate, even though the Court decided and there was admission to the fact that the building inspector did not comply with the Building Code as to notice and opportunity to be heard, and nevertheless took into consideration the testimony of the building inspector by such high handed method of summary abatement, forced the plaintiff to proceed "in lieu of prerogative writ", which was the only remedy open to plaintiff by the rules and which took the place of Certiorari, where no jury trial could be afforded on this question of nuisance,

A) This was not the kind of nuisance existing giving the building inspector summary right to abate it, when the plaintiff's request was to set aside his preceding in which he closed the building without notice and an opportunity to be heard denying plaintiff's right to due process of law under XIV Amendment of U. S. Constitution,

B) And by such action plaintiff would be denied the right to a jury trial, which jury trial the plaintiff is guaranteed. *Hutton* v. *Camden,* 39 N.J.L. 122, 23 An. Rep. 203 E&A (1876), *Coast* v. *Spring Lake,* 56 N.J.E. 615 affirmed

58 N.J.E. 586, 36 A21 E&A (1897), *Hill* v. *Portland,* 58 P (2nd) 55, 151 or 272 (1936), the Court exceeded its power to trying the question of the kind of nuisance, and

C) The Court should not have the Burden of Proof upon plaintiff by forcing the plaintiff to proceed first without the defendant having first testified at all. *North American Storage Co.* v. *Chicago,* 211 U. S. 306, 316, 317 (1908), *A. M. Print* v. *Lawrence,* 21 N.J.L. 248 (1848).

The Court having decided that there were other methods of abating the nuisance decision of December 29, 1966, on motion to restraint (77a, 7) upon the testimony of building inspector, therefore the Court in 1968 should have set aside the proceeding of the building inspector, *Ottan* v. *Chinn* 39 N. W. 670 (663a-4 to 639a-7).

The Court having found on December 29, 1966 decision on motion to restrain, after taking building inspector's testimony at (76a, 6):

> "in the Court's opinion, demonstrate the condition complained of could be remedied within reasonable time."

therefore should have set aside the proceeding of the building inspector and also two years thereafter when the same issue was tried August 1968. *Corbin* v. *Hays,* 50 S. W. 2nd 31, 44 Ky. 33 (1932); *Hill* v. *Portland,* 53 P. (2nd) 55, 152 or 27 (1936).

The Court should not have changed its opinion as to finding of facts in this decision then the Court's decision of two years ago on plaintiff's motion to restraint at which time the Court having called the building inspector to testify as to the condition of the apartments in the building testified differently than his present testimony, the Court's opinion than, December 29, 1966, Decision (77a) page 7 stating (391a to 412a) inclusive summarized by the Court at (411a-10).

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The Court's own motion was called on by the Judge to testify stated on page 7 (77a):

> "Mr. Muss persisted in his feelings that the building was unsafe for human habitation, but his testimony did not, in the Court's opinion, demonstrate that the conditions complained of could not be remedied within a reasonable time and upon proper enforcement of local officers, pursuant to relevant ordinances",

> the sole item remaining to be done (Exhibit P-6) the electrical work the only one upon which the petitioner is raising a question, namely, replacing the cable which requires tearing down walls and ceilings of every room, resulting in destruction of the building and requiring demolition,

and

> the building contractor, Albanese also stating (163a-3) I went through all the rooms, it needs a paint job, that's all it needs

and

> should not the Court take judicial notice of the fact that the building inspector, a licensed engineer (314a) taking a job with the Township as engineer and acting building inspector, the combined salary of which is less than $5,000 a year and who together with the electrical inspector were trying to send this plaintiff to their own electrical contractor, where he said $2,000 for electrical work also to be used to contradict Bruno's $1,500 (638a-12).

The Court should not have believed the testimony of the defendant's electrical inspector, never having gone to any school (531a-8; 530a-21 to 25) as against plaintiff's electrical engineer, especially when the defendant's elec-

tical inspector testified as to his good health, and previously in business employing 60 people and making over $20,000 a year taking a Township job paying only $5,500 and attempting to send this plaintiff's work to a certain electrician, his electrician (154a-1 to 155a-20; 157a-20 to 158a-13) and therefore refusing to give permit to plaintiff's electrician (539a-4; Ex. D-15) which included all work except taking down walls and ceilings (542a-14 to 545a-13) and made it so that plaintiff's electrician would back out, so that plaintiff would employ, the electrician recommended by him, and there never having been any complaints about the electrical cables put in the walls and ceilings before adoption of the new code (552a-7 to 20; 554a to 555a-1) and there being no necessity for 24 hour summary abatement (552a-23 to 553a-23) because the electrical inspector had the power to order the electric shut off, but was not necessary so to do, no reason (554a-7 to 14).

In any event, the Court, if it were permitted to decide upon the fact of nuisances, should have ordered only the basement and first floor should have been vacated, or remain vacated, and the other apartments should not have been vacated, and the Court's decision should have been to set aside the proceeding of the building inspector as to the other apartments and have the other closed apartments to be opened up where the evidence of (Exhibit P-5), of the Board of Health (217a; 238a-239a) and Exhibit P-6) of the building inspector whose demands were that only the basement and first floor were to be vacated (415a-416a).

The Court should have decided that one apartment could be occupied until the final determination of this action, because of an agreement between this plaintiff and the attorney for the defendants with the consent of the building inspector so as (101a; 140a-12 to 141a-9; 170a, 10-25; 213a-22 to 216a-25; 427a-20 to 432a-1) to prevent vandalism

The Court should not have denied introduction of testimony (219a-13, 223-1) and P-12 identification (213a-22) on the ground that as stated by the Court:

> "you are beyond the scope of pre-trial contentions." (223a-19)

when in fact in the pre-trial order appeared,

> "were the plaintiffs denied equal protection of the law under 14th Amendment of the U. S. Constitution."

In proceeding only against this plaintiff's building (417a-22) and should not they be allowed to show malice and similar chain of events by the building inspector to demolish only all houses and buildings of this plaintiff (213a-22 to 216a-25, 224-1) and identification P12 refused into evidence.

The Court should have taken into consideration the fact that the defendant's own witness, the electrician, Mr. Bruno, was contradicted by his own attorney as to his testimony, by the Court's statement as appears (638a-13 to 639a) and the Court's refusal to allow the defendant's attorney to answer material questions contradicting the witness heretofore testified testimony of building inspector Muss and also as to agreement reached between the building inspector Muss, the lawyer and this plaintiff to preserve the building until the trial of this action (640a to 641a), without the attorney raising any objection but the objection by the Court only by itself, and only because the Court by delaying the trial of this action 2 years contrary to what the rules permitted that action "in lieu of prerogative writ" should have been tried immediately, especially when the Court refused to grant this plaintiff's motion for restraint and thus by the two year delay caused great damage to the plaintiff in loss of rent and vandalism that naturally takes place in vacant buildings, and therefore the Court, to protect itself, found for the defendant,

facts which were not so, law that was not so, and Court's decision that were not so (639a-13 to 641a-13).

The Court should not have considered that the heating system was not working, as stated in its decision on 33a, one of the reasons why the summary action to abate the nuisance was taken, when in fact the building inspector did not know of that fact on November 9th, 1966 when the 24 hours notice to close up the building was given to the tenants, but discovered such fact after that when the heating system was fixed (447a-19 to 454a-12; 459a-1 to 461a-1; 492a, 1-13; 493a, 16-25), also that the 24 hour notice was given to the plaintiff prior to the date given to the tenants (194a-18) and thus proving there was no emergency. *Vanderhohen* v. *Rahway,* 120 N.J.L. 610 1 (A2) 303, *supra.*

The Court should not have denied the plaintiff's motion for restraint two years ago on December 29, 1966, when at top of page (75a) of the then opinion read:

> "upon the *Rosenberg* v. *Sheen,* 77 N.J.E. 476 and *Vanderhohen* v. *Rahway,* 120 N.J.L. 610, as stated by the Court (247a-23) stating the above cited cases of the plaintiff in his motion for restraint did not apply."

The Court, after stating (298a-24):

> "naked notice not enough constitutionally necessarily implies an opportunity to be heard before his property is taken without due process of law"

should not refuse to set aside the proceedings of the building inspector to close the building.

The Sanitary Code, not being covered by the building code (301a-20), the Board of Health, not making the judgment in this case (302a-13), except to notifying that only the basement and first floor apartments was unfit (302a-15). The Court should not have based its decision on

N.J.S.A. 26:3-46, 47, and 50, giving Board of Health only to pass Art. 13 Sec. 4 of the Sanitary Code and the defendant's attorney and the Court having agreed that defendant, Muss, was not the Board of Health but the building inspector and in addition would not the following appearing (305a-23 and 306a-3). Sanitary Code of the Board of Health of the Township of North Bergen, Hudson County, New Jersey, adopted January 16, 1923. This building was built before 1923 (102a-2) namely 1901, written on the blue stone building. The proceeding against the plaintiff, even if it were by the Board of Health, would be unconstitutional under U. S. Constitution which forbids Retrospective or Retroactive laws or proceedings.

The proceeding of the building inspector should have been set aside because the reason of the summary abatement was to punish the plaintiff for not complying with his request at the time he ordered (193a-5 to 194a-16; 465a-18 to 25 and B) especially the basement apartment which had many cats of which the neighbors complained of (465a-3 to 468a-1) and to please the neighbors next door (468a-10 to 471a-19).

The Court should have set the proceeding aside because of building inspector's intentions from the beginning was to close down the building by refusing to grant the plaintiffs a permit after directing him to do the construction work (193a-4 to 199a-19 and B). The plaintiff's electrician was refused a permit after the plaintiff was requested to do the electrical work (Exhibit P-15; 541a-545a-14).

The Court should have taken judicial notice of the fact that,

A) with many cats in the basement apartment, there could not be rats (499a-1-10) and

B) and that it was not as a matter of law for the landlord to control the roaches when it is confined to only one

apartment in a tenement house in accordance with Board of Health law,

C) and as a matter of law the landlord has no control of the uncleanliness of any tenant's apartment,

D) and that there cannot be summary abatement of nuisance on the grounds of uncleanliness of an apartment.

This plaintiff did not request that he appear as attorney for the plaintiff, Bertha Hoffman but agreed at the Court's suggestion so as not to offend the Court.

Delay of Justice is denial of Justice. The trial Judge Lynch, by delaying the hearing of this case for two years has denied justice. The object of the motion for restraining Order or in the alternative for an immediate trial was to prevent the property from being vacated as the defendants had proceeded to do by giving the tenants 24 hours to move out and were bringing the police to accomplish their purpose and this failing were proceeding against the tenants in the Criminal Court where the Magistrate was refusing to give the tenants a hearing, as he knew he had no power to order them to vacate, but instead was accomplishing his purpose by saying to the tenants he was going to put them in jail if they did not vacate the premises and move, and adjourning the trial again and again, although this plaintiff was asking for a trial of the issues to the effect that the Magistrate had no right to order the tenants to vacate. Heretofore, the same Magistrate had decided as to this plaintiff that he had no power to order this plaintiff, as the landlord, defendant in the Magistrate Court to dispossess or move the tenants out and vacate this premises in question. None of the tenants had moved out when the motion was heard by the trial Judge Lynch. All the tenants and the Building Inspector were waiting for the decision of Judge Lynch on this motion for a restraining order or an immediate trial.

The plaintiff's trial brief did not state that the plaintiffs were under the impression that an amiable adjustment

had been made. The following on page 2 of the brief is what was stated:

> "that an agreement was made between the building inspctor, Milton J. Muss, whereby he promised to allow one tenant to remain, as a caretaker, so as to prevent destruction by intruders. Even this agreement was breached and the building inspector Milton J. Muss broke his promise. When the only remaining tenant moved out, the building inspector, Milton J. Muss, ordered the Public Service Company to shut off the gas and electric, not only for that apartment, but the entire house, the outlets from the street, and the gas and electric meters removed. The building inspector, Milton J. Muss, refused to allow the Public Service Company to install gas and electric service to the new caretaker tenant who had rented the exact same apartment occupied by the former caretaker tenant who had moved out."

The application was not renewed for restraint because as stated by the Court that it was dismissed upon the case of *Rosenberg* v. *Sheen*, 77 N.J.E. 476, 77A 1019 and *Vanderhohen* v. *Rahway*, 120 N.J.L. 610, 1 (A2) 303, appearing at page (297a) of the testimony, which cases plaintiff had cited in his motion for restraint two years ago at which time the Court stated "there is doubt as to plaintiff's motion to such relief", and there being no way of curing this doubt in the Judge's mind as proved by this decision two years later at the trial there was no use in making the same motion over again resulting in antagonizing the Judge. It was thus clear a new motion would be useless, especially in view of the fact Judge Lynch stated in open Court, that he used to be a Magistrate and that this plaintiff could be proceeded against in the Magistrate's Court and fined $200 a day until he complied. The plaintiff at the argument on the motion had urged that if the motion for the restraint was denied, that the Judge should notice

the case for immediate trial or as soon as he possibly could to prevent the building from becoming vacant and consequently resulting in vandalism and breaking of windows by children. At the same time when the complaint in this law action was filed, an exact complaint was filed at the same time in the Chancery Court in case the action did not belong in the law Court. The case in Chancery having come up long ago was dismissed because the Chancery Court stated it belonged in the Law Court which was given equity power in prorogative writs. However, the Chancery, Judge Matthews stated he would speak to Judge Lynch as actions in "lieu of prorogative writ", were to be tried before other actions. But still there was a delay. When it finally came for pre-trial before Judge Lynch, he refused to pre-try it, and the case was sent back to the Assignment Judge who said that he had from the beginning assigned the case to Judge Lynch and Judge Lynch must dispose of this case. Judge Lynch again delayed in pre-trying it until later, when it was pre-tried and a date set for the trial before him.

The plaintiff did not request that the issue of existence or not of a nuisance be tried by the Court, in fact, the plaintiff not being a New Jersey attorney, would never allow an issue of fact to be tried by the Judge because all things being equal there is a tendency to favor a New Jersey lawyer as against a New York lawyer, who is appearing pro se, especially where a municipality is involved.

"In lieu of prorogative writ", the only way, according to the rules, to proceed in this kind of cases there is no jury trial to which plaintiff is entitled to on question of evidence of a nuisance and the only issue was to set aside the proceeding of the Building Inspector and have him proceed according to the Statute of New Jersey and the Building Code of the Township of North Bergen to give notice and have a hearing before the Commissions of the Township, otherwise plaintiff would be deprived of due process of law.

Rule 4:88-2. Prerogative Writs. The case will be tried triable without a jury except in instances, in quo warranto, requiring warrants and mandamus proceedings, where jury trials were available as of right under the Old Constitution.

How the Federal Questions Involved Were Brought Before the Supreme Court of New Jersey

The federal question as to denial of due process of law and equal protection of the law contrary to the provisions of Amendment XIV of the United States Constitution was raised at the pretrial which order (19a) in part read:

> "Plaintiffs also content that insofar as defendants charged that the electrical system of the building was deficient under the National Building Code applies only to buildings erected after its adoption, and the building involved was built long before the adoption of the National Building Code."

and (23a) read:

> "(4) Were the plaintiffs denied due process of law under the Constitution of the United States by the procedure adopted by defendants herein:
>
> (5) Were the plaintiffs entitled to notice of hearing and a hearing either pursuant to due process of law or under ordinances of the Township of North Bergen:
>
> (6) Were the plaintiffs denied equal protection of the laws under the 14th Amendment of the United States Constitution:"

At the trial both plaintiff and defendants introduced cases in regards to Amendment XIV (295a, 296a, 297a).

Gossard v. *Board of Adjustment*, 137 N. J. Law 630, 61 A(2) 167 (Supreme Court 1948), the Court quoting Mr.

Justice Holmes. Also appears in plaintiff's briefs:

> "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking."
>
> The Court: Naked notice isn't enough. Just a notice that you must vacate constitutionally (298a, 299a) necessarily implies an opportunity to be heard before his property is taken without due process of law."

Rosenberg v. *Sheen,* 77, N. J. Equity 476, 77A-1019 (1938), appearing in the Trial Court testimony 297a also appears in the plaintiff's brief:

> "The Court: What do you say about the *Rosenberg* case, 77 *N. J. Equity* 476?
>
> Mr. Bazzani: I see it in his brief.
>
> The Court: And you are not familiar with it?
>
> Mr. Bazzani: No, sir."

At 298a (p. 2.31):

> "The Court: Naked notice isn't enough. Just a notice that you must vacate constitutionally (298a, 299a) necessarily implies an opportunity to be heard before his property is taken without due process of law."

Rosenberg v. *Sheen,* 77, N. J. *Equity* 476, 77A-1019, appearing in the Trial Court testimony 297a also appears in the plaintiff-appellant's brief in the Appellate Division, page 41, states:

> "It will be noted that the court said: 'But it is entirely manifest that no action upon the part of the building inspector can be supported as a justification for the destruction of complainants' property rights, unless some opportunity has been first given to complainant to be heard.' It is true that the ordinance here under consideration provides for notice to be

given to the owner or occupant of the building but, to be valid, it should go further and provide that after notice an opportunity will be given the owner or occupant to be heard and have his rights adjudicated."

At (307a) of the trial Court, the constitutional question was again raised.

Mr. Ajamian: Your Honor, please, no proof, first of all, has been submitted to that effect. And the Board of Health originally, as I stated, and it's in evidence, only asked the basement apartment to be vacated. And then the basement and the first floor.

In addition, to that, I don't see the Section, the Articles he read in anyway applies to it.

And in the case of *Vanderhohen* v. *The City of Rahway,* clearly states where a situation has been in existence for a period of (308a) several months, in itself shows that they can't just go ahead and do it as they did summarily, they could have for a short time given proper notice.

The Court: All right, defendants' motion is denied at this time. The defense will be put in.

This case of *Vanderhohen* v. *Rahway,* 120 N.J.L. 610, 1 A. 303 (1938) was also in plaintiff-appellant's brief in the Appellate Division at page 23.

Notice must be given whether or not required by statute.

The appellate Court states:

"There can be no question of the right of the State, or of its right to delegate the power to a municipality, to exercise its police power to take or destroy private property in a summary manner when necessary for the safety of the public. But the necessity for such action must be caused by an emergency which requires prompt

action for public protection. For example, the immediate need for taking and destroying unfit food being offered for sale to the public or the immediate need for the destruction of buildings for the purpose of stopping or controlling a conflagration."

"(5) Concluding that the proceedings of the defendant were void because of this lack of notice resulting in a lack of opportunity for the prosecutor to be heard makes unnecessary a consideration of the other points raised to the constitutionality of the said statute or other alleged irregularities in the proceedings.

"The proceedings are set aside, with costs."

The original request in this plaintiff's action was also months ago not by the building inspector but the Board of Health (Exhibit 5) only to whom summary action was given. The building inspector was not given the police power of summary action, but had to follow the procedure of this building code. This case was commenced by Writ of Certiorari.

"In lieu of prorogative writ has taken place of 'writ of Certiorari', the only way to proceed and no other way by the rules of the Court in this kind of cases."

At 302a:

"The Court: May I see it, please; This refers to the Board of Health, right?

Mr. Bazzani: Yes, sir.

The Court: The Board of Health didn't make this judgment in this case, did it?

Mr. Bazzani: The Board of Health did, according to P-5 marked in evidence, notified Mr. Ajamian on July 8th that the basement and first floor apartment was unfit.

The Court: I see. That's apart from what the determination Mr. Muss made.

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Mr. Bazzani: That's right. And he was also notified by another letter, which he did not put in evidence, but will be in evidence, which was a determination by Mr. Muss that it was unfit for human habitation, notifying him of the decision of the Board of Health.

The Court: What opportunity to be heard is provided by this sanitary code, Article 13, Section 4?

Mr. Bazzani: No opportunity is to be given to the owner in advance of this determination. and—

The Court: You say that constitutionally a Board of Health in its own mind determine that it is a danger to health because of disease, and order the owner to vacate that building without any opportunity to be heard?

The Court: (305a) What's the date? Of the ordinance?

Mr. Bazzani: The date? This is not the entire ordinance, Your Honor. This is Article 13.

The Court: 1924, or something like that, wasn't it?

Mr. Bazzani: Sanitary Code of the Board of Health of the Township of North Bergen, Hudson County, New Jersey, adopted January 16, 1923.

This building was built before 1923. (306a)

Mr. Bazzani: That's right.

The Court: That section can't apply."

Even though the court stated that ordinance of the Board of Health adopted in 1923 did not apply as this plaintiff's building was erected long before this date, nevertheless based its decision upon this ordinance of the Board of Health (p. 36a) even though the 24-hour summary notice to vacate was not even by the Board of Health, to whom only police power was given by statute and not to the Building Inspector who was the one who acted summarily by 24-hour notice.

Even had the Board of Health acted under this ordinance, it would still be unconstitutional under the United States Constitution which prohibits retrospective or retroactive acts, that partake of the *ex post facto* law because this building was built long before this ordinance was passed, even if the Board of Health had acted, which it did not, it would have been unconstitutional.

The Building Inspector's action under this ordinance of the Board of Health certainly was unconstitutional being a retrospective or retroactive action under the United States Constitution, regardless of the fact that the ordinance was only to the Board of Health's protection and not the Building Inspector.

At 643a the Court states:

> "All right, this matter is adjourned then until we determine the next date, subject to the briefs being filed as I directed."

The briefs directed to be filed were as to the constitutional questions involved heretofore appearing in the testimony as to "due process of law" and equal protection of the laws as guaranteed by Amendment XIV of the United States Constitution and Article 1, Par. 1, Subsec. 1, Par. 10 of the New Jersey Constitution of 1947.

The Judge's opinion shows that the Constitution question was raised at the trial as appears (26a) of his opinion:

"Plaintiff claims that the action of the defendants was illegal and unconstitutional because: a) he was never afforded a hearing *before* the action of defendants in vacating the building and therefore was denied due process of law, b) that under Section 10 of the North Bergen Building Code and the National Building Code, which was adopted by Defendant Township he was entitled to such a hearing, c) that the National Building Code applies only to buildings erected after its adoption of February 16,

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1966, and the subject building was constructed many years before, and d) that there were in fact no violations of any law or ordinance of the defendant Township."

The Appellate Division by its decision stating "The judgment is affirmed essentially for the reasons stated by Judge Lynch", the trial Judge, raised all the Constitutional questions of the trial court's decision upon which the trial Court rendered the judgment, and so also the Supreme Court of New Jersey which also adopted the opinion of the trial Judge by dismissing the appeal which briefs was the same briefs submitted to the Appellate Division containing all the Constitutional questions raised in the trial Court.

POINT I

The trial Court which in this case was sitting as appellate tribunal in cases of in "lieu of prerogative writs" having decided that the building inspector did not comply with the Code as to notice and an opportunity to be heard and therefore not "due process of law" should have set aside the proceeding of the building inspector for it can not be that when a person comes into this Court to restrain an act of this kind, he thereby, as a matter of course, submits the question of dedication to this Court. If this should be so held, than municipal officers, by a sudden and summary attach upon property which they claim to be a nuisance, can drive its owner into this Court for protection and so compel him to try in equity a matter otherwise triable only at law, and deprive a party of his right to trial by jury as guaranteed by the United States Constitution, Amendment VII, and by the New Jersey Constitution 1947, Art. I, par. 9.

The Court should have set aside the proceedings of the building inspector.

N.J.S.A. 40:48-1 in Court's opinion on page 9, outlines the procedure. *Vanderhohen* v. *Rahway,* 120 N.J.L. 610,

1AT (2nd) 303 (1938).

Notice must be given whether or not required by statute.

The Appellate Court states:

"There can be no question of the right of the State, or of its right to delegate the power to a municipality, to exercise its police power to take or destroy private property in a summary manner when necessary for the safety of the public. But the necessity for such action must be caused by an emergency which requires prompt action for public protection. For example, the immediate need for taking and destroying unfit food being offered for sale to the public or the immediate need for the destruction of buildings for the purpose of stopping or controlling a conflagration.

In the instant case, however, there existed no emergency nor need for prompt action. In fact, nearly seven months elapsed from the time the building inspector reported that the buildings were in such dilapidated condition that they should be demolished and any action whatever being taken by the Common Council."

The original request in this plaintiff's action was also months ago not by the building inspector but the Board of Health (Exhibit 5) only to whom summary action was given. The building inspector was not given the police power of summary action, but had to follow the procedure of this building code as above. This case was commenced by Writ of Certiorari.

"In lieu of prerogative writ" has taken place of "Writ of Certiorari".

Judge Lynch should not have heard any testimony in regards to the condition of the building. He insisted upon

and directed both plaintiff and defendants to produce testimony in regards to the condition of the building in addition to the fact he directed plaintiff to go on with the case first as to his witnesses, thus shifting the burden of proof which was upon the defendant. However, having heard the testimony as to the condition of the building, he should have disregarded such testimony, except as relating to the procedure as to the fact, whether or not, the building inspector had properly complied with notice and hearing, 62 C.J.S. Sec. 281, note 37 cited by Judge Lynch, in his opinion, page 12. *Hill Military Academy* v. *City of Portland,* 53 p. (2nd) 55, 152 or 272 (1936) at p. 60, hereafter quoted to this effect. Judge Lynch having found that following in his opinion 36a and 37a should have decided as *Vanhohen* v. *Rahway,* that the proceedings of the building inspector be aside, the building allowed to be occupied, and the building inspector to following the procedure of the Building Code, to give the plaintiff notice and opportunity to be heard, as the summary abatement by 24-hour notice to vacate, deprived the plaintiff of due process of law in the XIV Amendment of the U. S. Constitution.

Judge Lynch's opinion on pages 36a and 37a states: "Plaintiff offered in evidence Section 10 of an ordinance adopted August 23, 1923, which purported to set forth the procedure required when the building inspector determined that a building was unsafe. As plaintiff points out, that section provides for a hearing before the Township Committee before and order to vacate may be made. Since it is conceded by defendants that no such hearing was granted, that ordinance may not be used as a basis to justify defendant's actions herein. Defendants also assert that they acted pursuant to the National Building Code which was adopted by North Bergen in 1966, but that ordinance by its terms (Sec. 100.3) limits its 'scope' only to buildings 'hereafter erected.' Since the subject building was erected many years before 1966, it cannot be said

that the National Building Code may be used as authority for the summary action taken herein. Nor can defendants rely on plaintiff's failure to appeal to the Board of Appeals provided by Sec. 107.6 of that code, as constituting a waiver of a right to a hearing."

Hill Military Academy v. *City of Portland*, 53 P. (2) 55, 152 or 272 (1936). The facts in the *Hill* v. *Portland* case is nearly exactly the same as this plaintiff's at page 58: "2, 3) It is plain that the council proceeded first to condemn the building as unsafe and a nuisance, and then changed and declared it a fire hazard."

"That said Hill Military Academy, a corporation has failed to remove said fire hazard and failed to make the necessary repairs to said building requisite for safe occupancy for school purposes. The Council, therefore, directs that the further use or occupancy of the building known as No. 2468 N. W. Northrup Street, situate on the real property hereinabove described, shall cease, and the bureau of Fire is hereby directed, to abate the further use and occupancy of said building and the Commissioner in charge of said bureau is hereby granted authority to close said building and to prevent its further use and occupancy, until such time as the Hill Military Academy, a corporation shall repair and put in a safe condition in accordance with the Building Code, said building. While we do not deem it absolutely necessary, we will refer to the condition of the building, as it may have a bearing on the case. The following cases are instructive upon the questions involved:"

Grossman v. *City of Oakland*, 30 Or. 478, 41 P. 5, 36 L.R.A. 593, 60 Am. St. Rep. 832; *Ex parte Wygant*, 39 Or. 429, 64 P. 867, 54 L.R.A. 636, 87 Am. St. Rep. 673; *Daniels* v. *City of Portland*, 124 Or. 677, 684, 265 p. 790, 59 A.L.R. 512; *Why* v. *City of Marshfield*, 138 Or. 167, 5 P. (2d). For the reasons stated herein, the decree of the circuit court is affirmed."

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The Trial Judge Opinion:

> "Thus here had defendants attempted to destroy this building undoubtedly the treat would be enjoined, pending a hearing."

This was in reference to plainitff's motion of two years prior to this trial for restraint, the Trial Judge's Opinion stated "nor is it a case where defendants have absolutely prohibited plaintiff from the use and enjoyment of the premises."

What is the difference between closing up this plaintiff's apartment house by vacating all the tenants and prohibiting plaintiff from the use and enjoyment of the premises. *Hill* v. *Portland, supra,* an injunction was granted where an attempt made as stated at page 60 heretofore:

> "to close said building and to prevent its future use and occupation, until such time, shall repair and put in safe condition."

The case states that there is no difference between destruction and closing down of the building. The closing is the preliminary step to destruction. Thus, Judge Lynch's decision should have been based upon the fact whether or not the building inspector had complied with the Building Code, that and nothing else. In any event only the basement and first floor were requested to be vacated. Why the vacating of all the other tenants and the complete closing of the building for two years until the trial took place (Exhibit 6, 217a; 240a; 241a-11; 253a-4; 415a-16 to 421a-4).

The defendants stated that at the hearing for restraint two years before the trial that they had no present intention of demolishing the building, but their intentions were the vacating of the building prelude to demolishing which fact was their actual intention, to have the building damaged

by vandalism. The empty building resulted in vandalism and other damages besides the loss of rents for two years. The defendants had prevented the building from being repaired in any manner whatsoever by ordering the electric, gas, and water to be shut off, telling the companies that the building is condemned and is to be demolished:

62 C.J.S. Sec. 281, p. 633 summary abatement, a city may not declare a building to be a nuisance, summarily eject its occupants, take charge of it and its contents and deprive the owner or tenant of the possession thereof, 89 Ky. *City of Corbin* v. *Hays*, 50 S. W. 2d 31, 244 Ky. 33.

Judge Lynch, having decided that the building inspector did not comply with the code as to notice and opportunity to be heard and therefore not Due Process of Law, he should not have considered any other testimony as to the condition of the building such other testimony being taken only for the purpose of seeing if the building inspector complied with the Code. *Hill* v. *Portland, supra,* at page 60. *Coast* v. *Spring Lake,* 56 N.J.E. 615, 36A-21, affirmed 58 N.J.E. 586, 47A-1131 E&A (1897) 51 L.R.A. 658. "Therefore, as I think, there was no power to abate in the method adopted, and as a result of the threatened demolition, for it cannot be that when a person comes into this court to restrain an act of this kind, he thereby, as a matter of course, submits the question of dedication to this court. If this should be so held, then municipal officers, by a sudden and summary attack upon property which they claim to be a nuisance, can drive its owner into this court for protection and so compel him to try in equity a matter otherwise triable only at law. I am therefore of the opinion that the complainant upon the original bill, is entitled to a decree."

The widely quoted case is to the same effect, *Hutton* v. *Camden,* 39 N.J.L. 122, 23 Am. Rep. 203 E&A (1876), that the plaintiffs are entitled to a jury trial on the condition of the building. Thus it will be seen that the only deci-

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sion that Judge Lynch could have rendered was to set aside the proceedings of the building inspector by *Vanderhohoven* v. *Rahway, supra,* and then afterwards if the building inspector should still want to force the matter further, follow the procedure of the code and upon the hearing, if the Commissioners should decide for him, the plaintiff has a choice of a trial by jury or by a judge on the question of whether or not a nuisance actually existed. This right of a jury trial on this issue cannot be taken away from this plaintiff, which the building inspector by his method proceeding is trying to do. *Coast* v. *Spring Lake, supra,* as this plaintiff is guaranteed to a jury trial on the condition of the building. *Hutton* v. *Camden, supra.*

Burden is upon defendant, yet Judge Lynch by causing this plaintiff to proceed first, No. 13 (23a) of the pretrial order, shifted the Burden of Proof upon the plaintiff by the United States Supreme Court, *North American Storage* v. *Chicago,* 211 U. S. 306, 1908 bottom of 316, 317 and *Am. Print Works* v. *Lawrence,* 21 N. J. Law, 248, 259 (1894).

N.J.S.A. 26:3-46, 47, 49 and 50 and Ar. 13, Sec. 4, the Sanitary Code quoted by Judge Lynch at page 11, if it gives any summary power at all, gives such power only to the board of health, Art. 13, Sec. 4 of the Sanitary Code.

This 24 hour notice to vacate was commenced by the acting building officer not by the Health Officer, Ar. 13, Sec. 4, of the Sanitary Code of the Board of Health and gives the building department no such right as exhibit P-5 at (177a) exhibit P-6 (181a to 201a) shows the demands of the building inspector but not to vacate the premises, all of which was complied with Exhibit 9 (199a to 201a), before the posting of the 24 hour notice by him. Therefore, only the Health Department and not the building department could attach the 24 hour notice and then only as to the basement and first floor apartments. Even

as to these two apartments, even if by the Board of Health, there would be a violation of the due process clause of the 14th Amendment of the U. S. Constitution. The Court's opinion that notice was given on July 8, 1966 and the summary abatement took place November 9, 1966. *Vanderhohoven* v. *City of Rockaway, supra,* clearly states where a situation has been in existence for a period of several months, in itself shows that they cannot just go ahead and abate summarily. *Lawton* v. *Steele,* 152 U. S. 136, 1894, quoted by Judge Lynch was a question whether a statute of New York was unconstitutional to remove and forthwith destroy, nets set or maintained to preserve fisheries. This summary action did not deprive the citizen of due process of law only and only because the value of the nets were very small, $15.00, a fixed total price of nets destroyed $216.

This plaintiff was deprived of property worth fifty thousand dollars and tenants a place to live by 24 hours forceful eviction. Page 36 *Lawton* v. *Steele, supra,* singled out by Judge Lynch is only a general statement of the Court, a prelude to what is to follow which Judge Lynch leaves out at page 137:

> "To justify the State in this interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interest, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations."

Mayor of Jersey City v. *Coppinger,* 101 N. J. Eq. 181. This was the case where City made an application to the Court, as the Township should have done in the plaintiff's case, at pp. 190, 191, 192.

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The defendant, Muss, acting building inspector, could not proceed under "Art. 13, Sec. 4 of the Sanitary Code" as this right was given only to the Board of Health, Exhibit 5 (179a-14 to 181a; Exhibit 6, 188a and 189a). No ordinance of North Bergen Township or statute gives such a right to the Building inspector.

Mayor of Jersey City v. *Coppinger, supra,* p. 190:

> "a municipal corporation, which can act only through duly accredited officers and agents when lawfully authorized. The authority of the building inspector, the 'department of superintendent of buildings' or the 'building department of Jersey City' to perform the acts attributed to them is not disclosed; nor does the bill disclose the provisions of the 'building code of Jersey City,' 'pursuant to which' it is alleged the building inspector caused a survey to be made of the premises aforesaid, nor is the authority of the 'survey committee' to declare the building at No. 258 Grove Street to be in a dangerous and unsafe condition, or the authority of the building inspector to order the defendant Geraldine Shinners to tear down the building No. 258 Grove Street, in whole or in part, or the significance of the 'due notice' alleged to have been given the defendant John J. Coppinger, disclosed."

Newark Railway v. *Hunt,* 50 N.J.L. 308, 12A 697 (1888), Chief Justice says at pages 313 to 317 only the Board of Health to whom this power of abatement of nuisance, without hearing could have a determination in Courts. The building inspector must follow the proceeding outlined in the North Bergen Building Code and cannot justify in Court that what he did was right. All the cases cited by Judge Lynch is where the Board of Health was a party, not the building inspector. *Coast Co.* v. *Spring Lake,* 56 N.J.E. 615, p. 624, 625, 36A 21 affirmed, 58 N.J.E. 586, 47A 1131 (1897), 51 L.R.A. 658 (modifies *Man Manf. Fertilizing Co.* v. *Van Kuren,* 23 N.J.E. 251 (Char. 1872), cited by Judge Lynch).

Coast v. *Spring Lake,* 56 N.J.E. 615 at p. 623, 624:

> "Nor do these cases, or the case of *Van Kuren* v. *Manhattan Manufacturing and Fertilizing Co.*, 8 C.E. Gr. 251, support the notion that the defendants, as representatives of the city, had a right to destroy these buildings by virtue of an inherent authority in the borough to abate a nuisance at common law.
>
> "In the last-named case the court was speaking of the power of citizens as such, and not as representing the corporation. The language used in the opinion in that case in respect to the power of private citizens has been modified by the case of *Brown* v. *De Groff, supra.* The authority to abate a public nuisance without judicial order or without following a procedure pointed out by statute is no greater in the person as officer than as a citizen. Either can abate an absolute obstruction in the street which prevents his passage and so does him a special injury. The case of *Inhabitants of Greenwich* v. *Easton and Amboy Railroad Co.*, 9 C.E. Gr. 217; S.C., 10 C.E. Gr. 566, was an instance of an appeal to the courts. It is by confusing the right of the individual with the acts of officers that the courts, in some cases, have alluded to the existence of a common-law power in a municipality to abate a nuisance in a way that would mislead to the notion that the authorities had an inherent power to do what they, as citizens, could not do."

Hutton v. *City of Camden,* 39 N. J. Law 122, 130, 23 Am. Rep. 203 E&A (1876), "a man's property cannot be taken away from him except upon trial by jury". At p. 12, Judge Lynch cites 62 C.J.S. Mun. Corp. Sec. 281, which at p. 631 states:

> "If the nuisance may be abated in any other way than by forcibly taking possession of the owner's premises, it is the duty of the municipal authorities to do it. *Md. Walter* v. *Cape Giordan,* 149 S. W. 36, 166 Mo. App. 467."

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The property itself, not the occupants, must constitute a nuisance in order to warrant the destruction thereof. *Bristol Door Co.* v. *Bristol,* 33 S. E. 588, 97 Va. 304, 75 Am. S. R. 783 (1899):

> "It may not be summarily abated without notice 91-92". *La Western, etc., R. Co.* v. *Atlanta,* 38 S. E. 996, 113 Ga. 637, 54 I.R.A. 294.

In Judge Lynch's opinion on plaintiff's motion to restrain two years ago, December 29, 1966, on pages 76a, 77a:

> "Defendant's affidavits filed herein do not demonstrate that the procedures suggested in § 104.3 or 104.4 have been complied with, nor do they demonstrate an 'emergency' permitting summary action. Indeed, at oral argument defendants' attorney stipulated that demolition of the building is not necessary.
>
> At oral argument the Court, in an effort to add some light to the confused picture presented by the pleadings, and on its own motion, called the defendant, Milton J. Muss, acting building inspector of North Bergen, to the stand. The purpose was to attempt to elicit some information as the present condition of the property. Mr. Muss persisted in his feelings that the building was unsafe for human habitation, but his testimony did not, in the Court's opinion, demonstrate that the conditions complained of could not be remedied within a reasonable time and upon proper enforcement by the local officers, pursuant to relevant ordinances."

62 C.J.S. Municipal Corporations Sec. 281, page 633.

> "a municipal corporation must resort to the usual process of law to abate a nuisance 90 *Ottum* v. *China,* 39 N. W. 670, 75 Iowa 405, at p. 671."

"The ordinary method of abating a public nuisance and punishing its author, is by criminal proceedings. *Mayor* v. *Canal Co., supra.* 'Though the jurisdiction of equity in restraint of public nuisances is well established, it will not be exercised where the object sought can be as well attained in the ordinary tribunals, unless upon the application of one who suffers a personal injury aside from the injury to the public'."

The defendant, acting building inspector, Muss, could have, as he already had done, proceeded in the Criminal Court instead of taking the law into his own hands. In the foregoing case, the municipality went to Court for an injunction, where as the defendant Muss, acted as the Judge and policeman in forcing the tenants to vacate the building. None of the tenants suffered personal injury.

The action "in lieu of prerogative writ" asked that the proceedings of the building inspector be set aside because of the fact that the building inspector did not comply with the National Building Code of notice and opportunity to be heard (a hearing) and not as Judge Lynch states at page 5:

"to account for the same".

This plaintiff did not ask the Building Inspector to account for anything, just to have his proceeding set aside. The "in lieu of prerogative writ" does not give this plaintiff a right to ask the building inspector "to account for the same". There is nothing for the building inspector "to account for." Any request to "account for the same" entitles this plaintiff to a jury trial. *Hutton* v. *Camden, supra.* "In lieu of prerogative writ" takes the place of writ of Certiorari which is an equity proceeding even though the law court only has jurisdiction of such in New Jersey. This is the only instance where an equity matter

is given to the law court to act in equity instead of Chancery and is in nature of Dispossess in the District Court in which cases there is no jury trial and like Dispossess actions, "in lieu of prerogative writ" is to come on immediately regardless of the fact Judge Lynch delayed it for two years.

The building inspector procedure is outlined by Sec. 10 of the North Bergen Building Code attached as an exhibit, and as appears in Judge Lynch's opinion, page 3 and the pre-trial order partly reads:

A. "after notice to and opportunity to be heard in the premises before said Township Committee afforded such owner."

B. "In case any building shall, after hearing in the premises aforesaid, be by the Township Committee be adjudged unsafe and dangerous, the inspector shall immediately serve a written or printed notice of such findings upon the owner of such building, commanding said owner to make such building safe and secure."

Coast Co. v. *Spring Lake,* 56 N.J.E. 615 p. 623, refutes Judge Lynch's opinion (35a) regards defendant, Muss, building inspector common law right to abate a nuisance.

POINT II

The forceable closing up of an apartment building by 24 hour notice without a hearing or an opportunity for a hearing and keeping it closed for over two years, resulting in destruction by vandals and thieves stripping the inside and outside, so that the building has to be razed to the ground constitutes taking private property contrary to the provisions of the Amendment V and Amendment XIV of the United States Constitution.

The Court should have granted the restraining order of the plaintiff or have tried the "in lieu of prerogative writ" action immediately.

Rosenberg et al. v. *Sheen, et al.*, 77 N. J. Eq. 476, 77A, 1019 (1910), cited by Judge Lynch who also cited 62 C.J.S. 281 Note 8, Supreme Court of Florida (1937). *Rowland* v. *State E.L.R. Martin*, 176 So. 545, 547, 129 Fla. 666, 114 A.L.R. 43, where in *Rowland* v. *Martin* refused to vacate according to the notice of the building inspector same as this plaintiff.

The Florida case *Rowland* v. *Martin, supra,* states:

(3) Before the property may be condemned and destroyed in the exercise of police power, except in cases of emergency, there must be an opportunity for the owner or occupant to be heard and an orderly determination of the issue as to whether or not the property is subject to condemnation under reasonable police regulations. A case directly in point is that of *Rosenberg* v. *Sheen*, 77 N. J. Eq. 476, 77 A. 1019, where the court cited this New Jersey case in full, part of the New Jersey case quoted by the Florida Court is as follows:

"(4) It will be noted that the court said 'But it is entirely manifest that no action upon the part of the

building inspector can be supported as a justification for the destruction of complainants' property rights, unless some opportunity has been given to complainant to be heard.' It is true that the ordinance here under consideration provides for notice to be given to the owner or occupant of the building, but to be valid, it should go further and provide that after notice an opportunity will be given the owner or occupant to be heard and have his rights adjudicated. We recognize the fact that the police power is a very broad one and that its exercise is necessary for the welfare of the community, but the right to exercise police power does not carry with it the unqualified right to destroy private property without due process of law. In emergencies such as those which are often caused by conflagrations, floods, windstorms, etc., it may become lawful to destroy private property without notice and without hearing for the protection of the public, and yield to the right and for the benefit of the public at large, but in the normal and orderly course of events this necessity does not arise, and the rights of the citizens to the acquisition and enjoyment of property must be respected to least to the extent of giving him the right to be heard before his property is taken without compensation and without a hearing before some tribunal authorized to determine the necessity and propriety thereof."

Judge Lynch should have granted this plaintiff's motion for a restraint or in the alternative tried this plaintiff's action of "in lieu of prerogative writ" immediately as the rules say he should, like that of Dispossess cases in the District Court and not two years afterwards resulting in vandalism and other destruction to the building, causing this plaintiff great loss besides the loss of rent during this period.

POINT III

The requiring of tearing down the walls and ceilings of each room to put in larger electric cables already in the walls and ceilings put there while the walls and ceilings were being constructed at the time the building was built and complying with the then Code, and the Court having decided that the National Building Code which embraced the Electrical Code adopted by the Township of North Bergen in 1966 did not apply to the plaintiff's building because the Code specifically stated it was to be applied only to buildings after its adoption and the Court having decided this building was built long prior to said Code and the present electrical cables never having caused fire since the construction of the building is a retrospective act or proceeding impairing the obligation of contract and vested right violative of the "due process" clause of the Fifth Amendment, and the XIV Amendment, and Art. I, Sec. 9, U.S.C.A.

The plaintiff was denied due process of law under the United States Constitution of the XIV Amendment.

The plaintiff is denied due process of law, and equal protection of the law under the United States Constitution of the XIV Amendment and impairment of the vested right of contract obligation guaranteed by Article I Section 10 to regulate remedies is subject to the United States Constitution's provision of the law impairing the obligation of a contract, which prohibition applies to laws impairing means of enforcement.

Municipality derives their power from estate law. *Citizen* v. *Board of Health,* 89 N. J. Superior 374, 215 A60.

New Jersey Statutes annotated 40:48-1. Even the legislature cannot by the enactment of a statute, confer upon a municipality any power, the exercise of which would de-

prive a property owner of constitutional rights. *Steinberg* v. *Bigelow*, 3 N. J. Misc. 1233, 131A, 114, 116 (1925), which is similar to *Ignocciumos* v. *Riley*, 98 N. J. Law 712, 121 A 783, affirmed by the Court of Errors and Appeals, 99 N. J. Law 389, 125A, 121, E & A (1924). Art. 1, Par. 20 N.J.C. and U.S.C. requires that due notice be given. *Steinberg* v. *Bigelow*, 3 N. J. Misc. 1228, 131 A. 114 (1925) —the Court stated:

(1) "This case involves, we think, the same question as was decided by this Court in the case of *Ignaciunas* v. *Riley*, 98 N. J. Law, 712, 121 A. 783, affirmed by the Court of Errors and Appeals, 99 N. J. Law, 389, 125 A. 121. This decision has been followed in innumerable cases among which are *Falco* v. *Kaltenbach* (N. J. Sup.) 128 A. 394; *Becker & Son* v. *Dowling* (N. J. Sup.), 128 A. 395; *Union County Development Co.* v. *Kaltenbach*, (N. J. Sup.) 128 A. 396. At the time of the decision of this case the act of 1924 referred to had not been passed. The legislature could not by the enactment of a statute confer upon a municipality any power, the exercise of which would deprive an owner of property of the right guaranteed him by the Constitution. The affect of the 1924 statute was considered in the recent case of *H. Krumgold & Sons* v. *Jersey City*, 130 A. 635, in the court of Errors and Appeals, decided October 19, 1925. In that case the court said."

The proceeding of the building inspector was retrospective and *ex post facto*, impairing the obligation of contract and partook of the character of *ex post facto* contrary to United States Constitution Ar. 1, Sec. 9 U.S.C.

United States v. *Michael*, 86 Fed. Sup. 453, 455, 1949, "impairing the obligation of contracts and this is violative of the due process clause of the Fifth Amendment

and the XIV Amendment", 86 Fed. Sup. 453, *Rederiaktier-bolaget* v. *Compania De Navegaction*, 139 Fed. Sup. 327 (1955).

Chicago, Rock Island and Pacific R. R. v. *Harden*, 272 U. S. 274, 294, 299, as far as due process of law is concerned. *Lawton* v. *Steele*, 152 U. S. 133, 137, 14 S. Ct. 499, 38 L. Ed. 385 (1894), the requirements must be reasonable and not unduly oppressive, restrictive, or costly otherwise it is unconstitutional.

Missouri Pacific R. R. v. *Nebraska*, 217 U. S. 196 (203) (1910), requiring the expenditure of money takes property whatever may be the ultimate return for the outlay.

C.J.S. Constitution Sec. 414: Retrospective and *ex post facto* impair obligation of contracts or partake of the character of *ex post facto* law U.S.C. Art. 1, Sec. 9.

Sec. 417: At common-law a cause of action is a vested right written the rule against retrospective operation of statutes (proceedings).

POINT IV

The petitioner was denied equal protection of the law guaranteed by Article I, Par. I, Subsec. I, Par. 10, New Jersey Constitution of 1947, and Amendment XIV of the United States Constitution by closing up only the petitioner's building and not every one built before 1966 when the National Building Code was adopted by the Township of North Bergen.

The building inspector's proceeding should be set aside and the building allowed to be opened up.

Judge Lynch's judgment against this plaintiff is based upon sanitary conditions as appears in his opinion 75a on page 6, but 62 C.J.S. Sec. 281, p. 633 N 86 quoted by

Judge Lynch. *Little* v. *Dist. Columbia*, 62 (A2), 874, 876 (1950):

> (5, 6) "Unless the condition which is the object of inspection amounts to an immediate danger or a dangerous nuisance per se, it would appear that municipal authorities would be acting beyond their powers in taking any summary action. Since sanitary or quarantine regulations and the like are promulgated by the community for its self-defense, they should not be carried beyond absolute necessity. Nothing herein indicates such urgency or immediate danger as to approve the total waiver of these protections."

62 C.J.S. Sec. 281, p. 633. The power summarily to abate a nuisance where, N. 85 and only where an emergency exists N 86, *Porter* v. *Seweston*, 238 p. 1014, 41 Idaho 324 at p. 1016.

> "The general authority to the health officer to absolutely quarantine in cases of the designated diseases 'whatever he deems necessary was not intended to and does not confer upon him unlimited power and right to control persons and property at his discretion. His action of such regard cannot be arbitrary, unreasonable or oppressive."

Note 88 *Walter* v. *Cape*, 149 S. W. 36, 42, 166 Mo. App. 476:

In this case where the premises were closed and locked up, the Court ordered the authorities to unlock and open the building.

> "We feel safe, following this decision of the Supreme Court of Pennsylvania, in holding that when this municipal corporation went beyond its charter privileges to the prejudice of plaintiff and undertook to take possession of his property without the preliminary steps prescribed by our constitution and statutes, it and its co-defendants are liable to be enjoined from

further trespass and a court of equity has power to cause them to undo what they have illegally done, irrespective of the amount of damage."

Mc Seon v. *City of Ft. Smith,* 48 S. W. 2nd 228, 185 Ark. 582, cites the New Jersey E. A., *Hutton* v. *City of Camden,* 39 N.J.L. 122, 23 Am. Rep. 203 (1876):

(1-2) "Here the facts of the case as to whether the building constituted a nuisance are in dispute, the call for application of the well-established doctrine, that no man can be summarily deprived of his property or the use thereof. The right to abate public nuisances is a common-law right, and is derived from the necessity of the case. It is akin to the right of destroying property for the public safety in case of a devastating fire. Where the facts are in dispute, the authorities cannot justify on the ground of present necessity. *Hutton* v. *City of Camden,* 39 N. J. Law, 122, 23 Am. Rep. 203; *People ex rel. Copcutt* v. *Board of Health of the City of Yonkers,* 140 N. Y. 1, 35 N. E. 320, 323, 23 L.R.A. 481, 37 Am. St. Rep. 522.

"This principle of law has been expressly approved by this court in *Ward* v. *City of Little Rock,* 41 Ark. 526, 48 Am. Rep. 46 and *Lonoke* v. *C.R.I. & P. Ry. Co.,* 92 Ark. 546, 123 S. W. 395, 135 Am. St. Rep. 200. In both of these cases the court quoted with approval from the opinion of Mr. Justice Miller in *Yates* v. *Milwaukee,* 10 Wall, 497, 505, 19 L. Ed. 984. After saying that the mere declaration by the city council that a certain structure was a nuisance, did not make it so, unless it in fact had that character, the learned justice said further:

'It is a doctrine not to be tolerated in this country that a municipal corporation, without any general laws either of the city or of the State, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to re-

moval by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities.'

"No notice was ever served on the plaintiff, a copy of the ordinance was posted on the premises. Giving, therefore, to the ordinance its utmost legal effect, still the proceedings must be regarded as entirely void, because it does not appear that jurisdiction was acquired over the plaintiff by giving the notice prescribed by the ordinances." 62 C.J.S. 281.

62 C.J.S. 281, Supp. N 88, Supplement N 85, Mountain Home, 337 P. 2d 377, 81 Idaho 74:

"• • • Municipalities do not possess unrestricted power to abate nuisances, abatement is limited to the necessities of the case. Property may be ordered destroyed under certain conditions, only if the nuisance cannot be abated in any other way. Here, cleaning and disinfecting will remove the unsanitary conditions, properly repairing the buildings on the premises will entirely remove the fire hazard, because of the material of which they are constructed. • • •" *Enchave* v. *City of Grand Junction,* 118 Colo. 165, 193 P. 2d 277, 280. (See also 9 Am. Jr. Buildings, Sec. 40, pp. 45-45 (supplement); 14 A.L.R. 2d annotations, *supra,* pp. 92-97.)

"Because the nuisance could be abated by cleaning and painting, the city went beyond its authority in ordering the building destroyed. The defendant acted at its peril, and having done so, it must respond in damages."

62 C.J.S. 281, Note 96, *Tebbetts* v. *McElroy Co.,* 56 F. 2d 621, page 623:

(3) "No servant of the people in public office arbitrarily may say to any person, 'Your business is closed.'

> Not all the forces of government may lock the door of the humblest shop save in accordance with the law of the land, for 'this is a government of laws and not of men.'" "These principles, which are founded in natural justice, already were old when Magna Charta was wrested from a tyrant king. They are written in the Bill of Rights of every nation of freemen."

Western v. *Atlanta,* 38 S. R., page 1000, quoting *Hutton* v. *Camden,* 39 N. J. Law 122, E&A 1876, *supra,* the widely quoted case by many states.

POINT V

The petitioner was denied due process of law guaranteed by the provision of Amendment XIV of the United States Constitution by forceably closing up of the apartment building, and thereafter ordering the water, gas and electric to be cut off by 24 hour notice without an opportunity to a hearing or being heard, resulting in complete destruction of the building by vandals and thieves stripping the building inside and outside.

Lawton v. *Steele,* 152 U. S. 133, 137, the court said there should not be any arbitrary interference with private business, or impose unusual and unnecessary restrictions upon lawful occupations.

The Constitution is "intended to preserve practical and substantive rights, not to maintain theories." See *Davis* v. *Mills,* 194 U. S. 451, 457, 48 L. ed. 1067, 1071, 24 S. Ct. 692. The separate clauses of the Fourteenth Amendment guaranteeing due process of law and equal protection of the laws refer to separate rights, the purpose being to

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require equal protection as well as due process. *George Benz Sons* v. *Erickson,* 227 Minn. 1, 34 N. W. 2d 725 (1948). But to deny equal protection is to deprive without due process.

POINT VI

The totality of the effect of the New Jersey administrative proceeding and the failure of the New Jersey courts to scrutinize and relieve the impact of it deprived petitioner of his property without due process of law.

Reasons for granting the writ.

The trial Court in case of prorogative writ as in this case, sits appellative tribunal to see if constitutional question is involved in regards to procedure to see if petitioner is deprived of his constitutional rights. The Appellate Division upheld the trial Court without an opinion of its own, stating for the reasons of the trial court. The Supreme Court dismissed the appeal to its court by the Chief Justice without a hearing.

The Courts of New Jersey by depriving this plaintiff of his Constitutional rights just because he is a New York Lawyer and not a New Jersey Lawyer or to help the officials in power of the Township of North Bergen for political reasons, or because the Judges sitting in this case knew or are personal friends of the Township attorney.

The presiding Judge of the Appellate Division had a conflict of interest having been the Administrator for creditors heretofore when he was a Lawyer, and when he had charge of this apartment building and his excessive fee was opposed by this petitioner.

This decision is doing great harm to the property owners of New Jersey and to all property owners of the United States, because this decision of the highest court

of New Jersey may now be used any official as the law of New Jersey—the law of the land—summarily close up by 24 hour notice without any opportunity to be heard, any business and building just because the official does not like its owner for political reason, money gain to himself or for any other personal reason.

This decision is contrary to all the decisions of every court of not only New Jersey but the courts of every state and the United States including the Supreme Court of the United States. It is also contrary to the Chief Justice's decision of New Jersey who rendered the decision in refusing to hear the petitioner by dismissing the appeal without a hearing as shown by the case of *Juzek* v. *Hackensack Water Company*, 48 N. J. 302 at page 314, 225A(2) 335 (Sept. 1966). Wherein he cites many New Jersey cases contrary to his decision against this petitioner as the following shows:

> "Procedural due process requires that notice and timely and reasonable opportunity to be heard and to defend be given the parties whose rights may so be affected. See In re Borough of Peapack-Gladstone, 11 N. J. Super 498 (App. Div. 1951); Test v. Test, 131 N.J.Eq. 197 (E. & A. 1942); Hinners v. Banville, 114 N.J.Eq. 348 (E. & A. 1933); The State v. Newark, 25 N.J.L. 399 (Sup. Ct. 1856); Township of Kearney v. Ballantine, 54 N.J.L. 194 (E. & A. 1891)."

At page 315:

> "Hackensack, having not included in its formal written application a request to Water Council for permission to condemn the Juzek lands and having failed to give notice to the Juzeks of a hearing on the issue of condemnation approval, the requirements of due process were lacking and the order of Water Council insofar as it grants that right is void."

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"For reversal—Chief Justice Weintraub and Justices Jacobs, Francis, Proctor, Hall, Schettino and Haneman—7.

For affirmance—None."

CONCLUSION

This Court should grant certiorari, and the judgment below should be reversed for the following reasons:

1. Unquestionably, petitioner has been deprived of a very valuable property right, and the judgment below becomes the law of New Jersey depriving all property owners of their valuable property rights, and this has taken place in such a manner that the combination of circumstances should move this Court to grant him relief if that is at all possible.

2. Petitioner has no other remedies in the Courts of New Jersey, and with the utmost deference to those Courts, it must be asked whether he should be allowed to remain helpless in the face of what is at least morally an injustice.

Respectfully submitted,

ARAM AJAMIAN,
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A New York Attorney.

APPENDIX A

Opinion.

(*Filed 9/3/68*)

Plaintiffs, Aram Ajamian and Bertha Hoffman,[1] in the amended complaint filed in this action in lieu of prerogative writ, allege that they are the "owners" of a tenement house known as No. 2525 Hudson Boulevard, in the Township of North Bergen, New Jersey. They seek a review of the action of the defendant Township through the defendant, Muss, its acting building inspector, when, on November 9, 1966, he served an order upon the plaintiff, Aram

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[1] Plaintiff, Aram Ajamian, is an attorney of the State of New York, but not of New Jersey. He has appeared *pro se* and, with permission of the court, has appeared as attorney for the plaintiff, Bertha Hoffman. This circumstance has tended to obscure plaintiff's factual and legal arguments as he has attempted to prosecute this action under New Jersey law and procedure. The original complaint herein was filed on December 7, 1966, and was so prolix and obscure that it was stricken by the court pursuant to a letter opinion dated December 29, 1966. In that opinion the court gave plaintiffs leave to file an amended complaint within ten days thereafter and specifically pointed out, by way of advice, the elements which should be alleged in the amended complaint. At the same time plaintiffs were given leave, upon filing of the verified amended complaint, to renew their application for *ad interim* relief. They failed to do so for the reason, as asserted in plaintiff's trial brief, that they were under the impression that an amicable adjustment had been made between the plaintiffs and the building inspector. In any event, an amended complaint was filed but since plaintiffs did not renew their application for *ad interim* relief, this court was unaware of its filing and it was not brought to the court's attention until the matter, in the ordinary course, was noticed for pretrial on May 10, 1968. The amended complaint is scarcely an improvement over the original complaint in terms of clarification of issues. In any event, the pretrial order was dictated by the court in an effort to accomplish that end. At trial, it was conceded that Bertha Hoffman has no interest in the property and as to her the complaint was dismissed. Reference to "plaintiff" therefore is to Aram Ajamian. As to his status, see below.

Ajamian, directing that the said tenement house be vacated within a period of 24 hours for the reason that it was "unfit for human habitation or occupancy." It is further alleged that pursuant to said order defendant Township, through its officials, evicted the tenants from the building. No hearing was afforded to plaintiff by defendant's officials.

Plaintiff claims that the action of the defendants was illegal and unconstitutional because: a) he was never afforded a hearing *before* the action of defendants in vacating the building and therefore was denied due process of law, b) that under Section 10 of the North Bergen Building Code and the National Building Code, which was adopted by defendant Township, he was entitled to such a hearing, c) that the National Building Code applies only to buildings erected after its adoption on February 16, 1966, and the subject building was constructed many years before, and d) that there were in fact no violations of any law or ordinance of the defendant Township.

The defendants' contentions may be summarized as follows: a) plaintiffs are not the "owners" of the building in question, b) the condition of the building, as revealed by several inspections by its various officials, was a "public nuisance" which, under the Township's "police power," it had the right to abate summarily and without hearing, c) since the National Building Code adopted by defendant (Section 107) afforded plaintiffs an appeal to the Board of Appeal from any action of the building inspector, the opportunity for hearing was thereby afforded, and since such appeal was not taken, any right to hearing was waived, and d) in any event, such a hearing has been afforded before this court which heard testimony of the several officials of the Township who made the inspections of the building, as well as testimony on behalf of plaintiff.

When the matter came on for trial, defendants persisted in their contention, as asserted in their answer, that plain-

tiffs were not "owners" of the property and therefore had no status to assert violation of rights herein. After the taking of some testimony the matter was adjourned to permit plaintiff, Aram Ajamian, to establish title. Finally, he conceded that Bertha Hoffman was not an owner of the property. Defendants produced a title searcher who testified that nowhere in the record title was Aram Ajamian revealed as an owner. The latter, however, made two alternative contentions. He said the property had been owned by his brother, Harry Ajamian (whose name did not appear in the chain of title), who died intestate in 1954, leaving six sisters and brothers, of whom Aram was one. Therefore, it was said by plaintiff, he was the owner of a one-sixth interest by descent. Inconsistently and alternatively, he contended that he held several unrecorded deeds from the record owners and that he owned the property in his own name. He produced said deeds, dated at various times in the last several years, but on which the acknowledgment, oddly, was taken on June 20 and 21, *1968*, during the period in which the trial herein was interrupted, as above mentioned, to permit plaintiff to establish his ownership.

The proofs offered by plaintiff in support of his claim of title are not persuasive. However, for several years the defendant Township, in its efforts to correct the conditions existing in the building, had treated Aram Ajamian as owner, had filed a complaint in the Magistrate's Court against him wherein he was found guilty as owner and fined $100, and the notice to vacate of November 9, 1966, was served upon him. In addition, it is uncontradicted that Aram Ajamian has been acting at least as agent for the record owners and has collected the rents on the property for several years. The court therefore holds that the defendant Township is estopped to deny that plaintiff has sufficient status to prosecute this suit.

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Appendix A.

Evidence was taken before the court on four trial days. The testimony supports the following findings of facts which are hereby made.

The premises involved consist of a six-family tenement house. The rents charged from $90 per month for the basement apartment, to $125 per month for an apartment on the first floor, though there is some testimony by plaintiff, Aram Ajamian, that the rents were paid on a weekly basis. In any event, those rents approximated $615 per month.

On July 8, 1966, defendant Muss, then Acting Building Inspector, accompanied by Health Officer McClosky, Electrical Inspector Bruno and Plumbing Inspector Easton, examined the premises. The basement apartment, part of which had a concrete floor, smelled from human and animal waste, with droppings on the floor. A young girl was eating at a table on which roaches crawled. The toilet was covered with human excretion and the sink was taped "as though to stop a leak." As a photograph in evidence reveals (Ex. D-9), the metal ceiling in the kitchen was torn open in several places exposing the wooden lath beneath. Rat droppings were under the kitchen stove. This basement apartment was adjacent to the boiler room, which was filled with pieces of furniture, debris and wooden boxes. From it came the stench of "old human waste." The doorway from the boiler room to the apartment was propped up with a piece of wood. A metal fire door was jammed open and was not operable. In a "filthy" bed the mother of the family lay ill. The door from her bedroom to the hallway was missing, a blanket being stretched across the opening in its stead. This basement and its apartment may be described as "filthy" as the photographs in evidence reveal.

The building had many children in it. On the front stoop, a wooden post holding up the roof was missing. If one leaned against the remnant of the column, the post

would fall down upon anyone who may happen to be beneath it.

In the rear was a garage. Down to its roof came the fire escape. The east face of the garage tilted out of plumb and eventually fell down. Its rear wall had been struck by cars, was also put out of line and had a good-size crack in it. Later on, this was partially repaired. In the north alleyway the risers on the side stairs had broken away, rendering it unsafe to use.

In the "Morrison" apartment on the first floor (rent $125 per month) there was a leak over the kitchen sink and paint and paper peeled off the wall over the stove and sinks. In the bedroom the floor was rotten around the radiators, probably from water leaks. The ceilings were a "checker-board" of cracking, all over. The toilet was "covered with excreta" and the smell from the basement permeated to this floor above.

On the stairway leading to the second floor the handrail of the bannister was broken, so that it was "shaky" if weight was put upon it. In place of rails in the bannister, rope was woven back and forth and as one moved on the steps he could feel them deflect under the weight.

In the "McLaughlin" apartment on the second floor a section of the ceiling had come down over the kitchen sink, exposing 3 to 4 feet of wooden lath. The ceiling was still wet and part of it had "bellied".

The stairway to the third floor was "better" than that to the second. The fire escape ladder to the roof was "quite shaky." If a hand were put to it, it would vibrate but not fall down.

Electrical Inspector Bruno testified that 30 ampere fuses had been used in the meter board. They had "blown," indicating either a short circuit or overloaded circuit. These fuses were oversize. The risers to the apartments could carry only 15 amperes. Thus the use of 30 ampere fuses

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allowed the overload, permitting the insulation in the wires to "bake to a crisp." "Zip chord" outlets were used, some loose and some nailed to the baseboards. They were frayed and, in some cases, their insulation was broken. Each apartment showed more appliance load than the wiring could carry on an overloaded fuse. At the cellar steps there was an open outlet box, with wiring exposed, which could be reached by any of the children in the building with possible fatal results. All of these conditions presented conditions hazardous to fire.

The foregoing conditions on July 8, 1966, described by Muss, the Building Inspector, were corroborated by the testimony of the witness Easton, Plumbing and Sanitary Inspector, and Bruno. After the inspection, defendants officials conferred with plaintiff. He pleaded for time to correct the conditions. On July 8, 1966, Health Officer McCloskey, referring to "our oral agreement," wrote to plaintiff ordering him to vacate the basement and first floor apartments, as being in violation of North Bergen Sanitary Code, Article 13, Section 4. This order was ignored. In August, new inspections were made, but conditions were the same. On August 15, 1966, Inspector Muss wrote to plaintiff demanding that the building be vacated as "unfit for human habitation." This was not complied with. Another letter was sent by Muss on August 16, with particular reference to the garage wall which he demanded be removed and rebuilt, and that the alley steps and front porch be repaired. Ultimately the garage wall was repaired, but not rebuilt. Nothing appears to have been done to the alley steps. Through August, other inspections were made. Conditions remained the same, but plaintiff asked for more time to take care of the building. Finally a complaint was filed in the Magistrate's Court returnable October 31, and plaintiff was fined $100. He asked for a permit to "repair" the garage. It was refused for two rea-

sone: a) "repair" was not sufficient, rebuilding was necessary (in a short time it collapsed) and b) plaintiff was claiming that he was not the owner of the property but agent for Bertha Hoffman and, in Muss' words, she was a "phantom" whom plaintiff Ajamian never produced.

Finally in November, 1966, inspections revealed that conditions were substantially the same as they had been. But with the weather getting cold and the revelation that the heating system was not working, that the tenants were using their gas stoves to provide heat, and plaintiff's persistence in not correcting the unsanitary and unsafe conditions, the situation was emergent. Action was necessary. The notice to vacate was served on November 9, 1966, and the building was vacated. It is this action which plaintiff seeks to nullify here.

The court finds that this building, in the conditions described, constituted a "public nuisance." In *Boden* v. *City of Milwaukee*, 8 *Wisc. 2d* 318 (*Sup. Ct.* 1959), 99 *N. W. 2d* 156, such a nuisance was defined:

> "(10) We approve of the statement of the Florida supreme court, 'It is generally recognized that anything which is *detrimental to health or which threatens a danger to persons* or property within the city may be retarded and dealt with by the municipal authorities.' City of Miami Beach v. Texas Co., 1940, 141 Fla. 616, 194 So. 368, 374, 128 A.L.R. 350. We also deem apposite the following declaration by a Texas court: 'For a nuisance to be a public one, it need not affect the whole community; but it is public if injury or annoyance affect the people of some local neighborhood, or are occasioned to such part of the public as come in contact with it.' Stoughton v. City of Ft. Worth, Tex., Civ. App. 1955, 277 S. W. 2d 150, 153." (Emphasis added)

By N.J.S.A. 40:48-2.3, it is declared to be the policy of this State that the occupation of any building which is dan-

gerous, unsafe, insanitary or otherwise unfit for human habitation is inimical to the welfare and injurious to the health and safety of people of the State and that public necessity exists for the closing of such a building.[2] This building was clearly detrimental to the health and safety of its occupants and to anyone who would come in contact with it, or may be within the area of exposure to its unsanitary condition.

Plaintiff offered in evidence Section 10 of an ordinance adopted August 23, 1923, which purported to set forth the procedure required when the building inspector determined that a building was unsafe. As plaintiff points out, that section provides for a hearing before the Township Committee before an order to vacate may be made. Since it is conceded by defendants that no such hearing was granted, that ordinance may not be used as a basis to justify defendants' actions herein. Defendants also assert that they acted pursuant to the National Building Code, which was adopted by North Bergen in 1966, but that ordinance by its terms (Sec. 100.3) limits its "scope" only to buildings "hereafter erected." Since the subject building was erected many years before 1966, it cannot be said that the National Building Code may be used as authority for the summary action taken herein. Nor can defendants rely on plaintiff's failure to appeal to the Board of Appeal provided by Sec. 107.6 of that code, as constituting a waiver of a right to a hearing.

However, defendants contend that they had a common-law right to summarily abate the nuisance here present with or without statutory or ordinance authority. In any

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[2] While it is true that the said statute provides for a hearing before such a building may be vacated, it also provides, by N.J.S.A. 40:48-2.11, that the statute does not impair any existing powers to prevent violations thereof, but is in addition and supplemental to any powers conferred by any other law.

event, they point to *N.J.S.A.* 26:3-46, 47, 49 and 50, which in substance gives a local board of health the power to abate such a nuisance as existed here, even without an ordinance. Lastly, they specifically refer to Art. 13, Sec. 4 of the Sanitary Code, adopted January 16, 1923, which reads as follows:

> "Sec. 4. Whenever it shall be decided by this Board that any building or part thereof is unfit for human habitation by reason of its being so infected with disease or by reason of its being in a condition dangerous to health or life or to be likely to cause sickness among the occupants, and notice of such decision shall have been affixed conspicuously on the building that it is unfit for human habitation and the owner shall have been served with the notice or the agent or lessee, in cause (sic) the owner cannot be found within the State, requiring that all persons therein shall vacate such building or part thereof, (sic) shall within ten days thereafter be vacated, or within such time as in said notice may be specified."

The latter section was specifically referred to in the notice of July 8, 1966, sent by Health Officer James E. McCloskey, to the plaintiff, wherein the plaintiff was ordered to vacate the basement apartment and the entire first floor of the building.

The court finds that defendants had the authority to summarily vacate the building both under the authority of *N.J.S.A.* 26:3-46, 47, 49 and 50, as well as Art. 13, Sec. 4 of the Sanitary Code. It also finds that the right of summary abatement was warranted under the exercise of the common-law right to abate a public nuisance.

In vacating the subject premises, defendants performed an act within "the police power." That power includes "* * * everything essential to the public safety, health and

morals, and to justify the destruction or abatement by summary proceedings, of whatever may be regarded as a public nuisance." *Lawton* v. *Steele,* 152 U. S. 133, 136 (1894), *Thornton* v. *Chase,* 23 N.Y.S. 2d 735, 175 Misc. 748 (Sup. Ct. Spec. T. 1940) 14 *A.L.R.* 2d 74, 39 *Am. Jur.* 455, *Nuisances,* § 184.

As said in *Weil* v. *Ricord,* 24 N.J.E. 169 (*Chan.* 1873) at 173:

> "Among the objects sought to be secured by municipal government, there is none more important than the preservation of the public health, and, therefore, the imperative obligation rests on the government of every city, promptly to abate or remove all nuisances by which the public health may be affected. It is no less its duty to provide, in like manner, for the comfort and convenience of the inhabitants within its limts. To these ends, such governments are clothed with police powers. These being among the powers which are of the most importance to the inhabitants, those by which the public peace, health, comfort, and convenience, and the general welfare are secured or promoted, are not only respected, but maintained by the courts, which, as a matter of public policy, will not interfere with or disturb municipal bodies in the legitimate exercise of those powers. It is only when those bodies transcend their limits, in that respect, that the aid of the courts can be successfully invoked to restrain them, or to visit upon them the injurious consequences of their acts. *The necessities of the community oft-times require the promptest and most positive action.* There are times when public health is the object of paramount concern, and the law wisely lodges in municipal bodies, the discretion and power adequate to such emergencies, a power and discretion

whose existence is, at all times, necessary to secure the public health, comfort, and convenience." (Emphasis added)

See also 62 *C.J.S. Municipal Corporations,* § 281.

The right to abate a public nuisance is a common-law right which pre-existed the enactment of the Federal Constitution and hence is not within the prohibition of the provisions of that instrument, and exists in the absence of statute. 39 Am. Jur. 454, *Nuisances,* § 183, *Manhattan Manufacturing and Fertilizing Co.* v. *Van Keuren,* 23 N.J.Eq. 251 (*Chan.* 1872). In the latter case, it was said, at 255:

"At common law, it was always the right of a citizen, without official authority, to abate a public nuisance, and without waiting to have it adjudged such by a legal tribunal. His right to do so depended upon the fact of its being a nuisance. If he assumed to act upon his own adjudication that it was, and such adjudication was afterwards shown to be wrong, he was liable, as a wrong-doer, for his error, and appropriate damages could be recovered against him. This common law right still exists in full force. Any citizen, acting either as an individual or as a public official under the orders of local or municipal authorities, whether such orders be or be not in pursuance of special legislation or chartered provisions, may abate what the common law deemed a public nuisance. In abating it property may be destroyed and the owner deprived of it without trial, without notice, and without compensation. Such destruction for the public safety or health is not taking of private property for public use, without compensation or due process of law, in the sense of the Constitution. It is simply the prevention of its noxious and unlawful use, and depends upon the principles

that every man must so use his property as not to injure his neighbor, and that the safety of the public is the paramount law. These principles are legal maxims or axioms essential to the existence of regulated society. Written constitutions pre-suppose them, are subordinate to them, and cannot set them aside. They underlie and justify what is termed the *police power* of the state. By virtue of that power, numerous and onerous restrictions and burdens are imposed upon persons and property which, for other purposes or on other grounds, would be prohibited by the constitutional limitations sought to be applied in this suit. *Cooley on Const. Lim.* 572; *Potter's Dwarris on Statutes* 444."

See also 39 Am. Jur., *Nuisances,* pp. 455, 457, 462, §§ 185, 185, 187; *North American Storage Co.* v. *Chicago,* 211 U. S. 306 (1908) and 14 A.L.R. 2d 74.

In *City of Miami Beach* v. *Texas Co.,* 141 Fla. 616 (1940), where an ordinance authorized health officials to condemn a building as unfit, it was held that the effect of the ordinance was to declare the building a public nuisance. *Cf Boden* v. *City of Milwaukee, supra.* Thus where Art. 13, Sec. 4 of the Sanitary Code of North Bergen authorizes the closing of a building as being "unfit for human habitation by reason of its being so infected with disease or by reason of its being in a condition dangerous to health or life or to be likely to cause sickness among the occupants" it too declares a building within its terms a public nuisance. Such abatement for public safety or health is not a taking of private property for public use, without compensation or due process of law, in the sense of the Constitution. It is simply the prevention of its noxious and unlawful use and in that context the safety of the public is the paramount law. As said in the leading case

of *Health Department of City of New York* v. *Rector, &c. of Trinity Church,* 145 N. Y. 32, 39, N. E. 833 (1895), at page 836:

> "Laws and regulations of a police nature, though they may disturb the enjoyment of individual rights, are not unconstitutional, *though no provision is made for compensation for such disturbances.* They do not appropriate private property for public use, but simply *regulate its use* and enjoyment by the owner. If he suffers injury, it is either damnum absque injuria, or in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure. 1 Dill. Mun. Corp. (4th Ed.) § 141, and note 2; Com. v. Alger, 7 Cush. 83, 84, 86; Baker v. City of Boston, 12 Pick. 183, 193; Clark v. Mayor, etc., 13 Barb. 32, 36. The state, or its agent in enforcing its mandate, *takes no property of the citizen when it simply directs the making of these improvements.*" (Emphasis added)

See also *Manhattan Manufacturing and Fertilizing Co.* v. *Van Keuren, supra,* and *Thornton* v. *Chase, supra.*

This is not to say that one whose property has been summarily taken, vacated or destroyed is not entitled to a hearing at some stage in the proceedings. Nor is it to say that the determination of public officials that a building or its condition is a public nuisance is *final and conclusive* as to that fact so as to preclude a hearing to the property owner on that question. To ascribe to such determination the quality of conclusiveness or finality, without a hearing on the issue, is indeed a denial of due process of law. But no hearing is necessary, within the constitutional requirement of due process, if the determination of the officials is *not* held to be *conclusive,* and so long as a hearing is, at some time, afforded as to the

fact *vel non* of nuisance. *North American Storage Co.* v. *Chicago, supra, Lawton* v. *Steele, supra,* 39 Am. Jur. Nuisances, p. 462, § 187, *Manhattan Manufacturing and Fertilizing Co.* v. *Van Keuren, supra,* and *Hutton* v. *Camden,* 39 N.J.L. 122 (Ct. Err. & App. 1876).

As said in *City of Newburg* v. *Park Filling Station,* 75 N.Y.S. 2d 439 (Sup. Ct. App. Div. 2d Dept. 1947);

> "Where property of an individual is to be condemned and abated as a nuisance, it must be that *somewhere between the institution of the proceedings and the final result the owner shall be heard in the courts upon that question, or else that he shall have an opportunity, when calling upon those persons who destroyed his property to account for the same, to show that the alleged nuisance was not one in fact.* Health Department of City of New York v. Rector, etc., of Trinity Church, 145 N. Y. 32, 47, 48, 39 N. E. 833, 838, 27 L.R.A. 710, 45 Am. St. Rep. 579. It is sufficient to satisfy the constitutional safeguards of the owner, if he does not have a hearing in advance of the order, that he have the right to present his defense after the order is made. The Board has the power thus to act to protect the public health, without notice to the owner, even though there is no emergency requiring speedy action and though the Board has ample time in which to give notice to the owner and have a hearing on the question whether the nuisance exists. North American Cold Storage Co. v. City of Chicago, 211 U. S. 306, 29 S. Ct. 101, 53 L. Ed. 195, 15 Ann. Cas. 276." (At p. 441) (Emphasis added)

By this action in lieu of prerogative writ, plaintiff here is "calling upon" defendants, who vacated the property, "to account for the same." He has been afforded the opportunity in this court "to show that the alleged nuisance

was not one in fact." Here he has had his hearing. The essential weakness in plaintiff's argument that he was entitled to a hearing before the defendants vacated the building lies in his failure to recognize the distinction between those cases where "conclusiveness" or "finality" is claimed for the determinaion of the officials, and those where no such quality is ascribed to them. The distinction is well illustrated in the two New Jersey cases of *Manhattan Manufacturing and Fertilizing Co.* v. *Van Keuren, supra,* and *Hutton* v. *Camden, supra.* In the former case, the court refused to enjoin the abatement of an alleged nuisance before a hearing but expressly stated that its action would not foreclose a later adjudication as to whether, in fact, a nuisance existed. As the court said, at page 256:

> "In the present case the complainants deny that their business or works are a nuisance. The defendant avers that they are, and affidavits are offered on both sides in support of these assertions. In the view I take of the case, *the defendant acts at his peril.* His own adjudication of the fact of a nuisance will not protect him, as would the judgment of a court. It was said at the argument that actions had been commenced against him for the recovery of damages, and are now pending. It is unnecessary for me now, and in my judgment would be improper, to express an opinion upon the question to be determined in such actions. It is sufficient to say that the affidavits to show the offensive and noxious odors emitted and pervading at times the vicinity of the works, are numerous and explicit. They are sufficient to prove that the commissioner's conclusion as to the character of complainant's business and works, was not entirely without evidence to support it. The correctness of the conclusion is not now to be determined." (Emphasis added)

In *Hutton* v. *Camden, supra,* however, the plaintiff, City of Camden, contended that the determination of its board of health that a nuisance existed was conclusive and not subject to further judicial review. In that case, the city sued the property owner for $213.30, the cost of abating the alleged nuisance. The lower court rejected proof offered by the defendant that there was not a nuisance in fact. On appeal, the Court of Errors and Appeals reversed, saying that the lower court considered the resolution of the health board as "absolutely conclusive," that "that ended the matter," and that it was "inpoint of law, final, and to import absolute verity." The court distinguished *Manhattan Manufacturing and Fertilizing Co.* v. *Van Keuren,* pointing out that, in that case, "conclusiveness" was not ascribed to the official determination as to the fact of nuisance.

Plaintiff, however, claims that he was entitled to a hearing before the officials acted. In *Egan* v. *Health Department,* 45 *N. Y. Supp.* 325, 20 *Misc. Rep.* 38 (*Sup. Ct. Spec. T.* 1897), plaintiff was the owner of a tenement house. The defendant ordered that the tenants vacate the premises because the building was "unfit, and not reasonably capable of being made fit, for human habitation, by reason of want of proper ventilation, and by reason of want of repair and defects in the drainage and plumbing, and likely to cause sickness among its occupants, and that the occupancy of said building is dangerous to life and detrimental to health." The suit sought to enjoin the Health Department from enforcing its order. The court said, after trial: "The unsanitary condition of the building was obvious, the facts had been reported to the board by its officers who were charged with the duty of personal inspection, and at least two of the commissioners had themselves personally examined the property."

The court said, at page 326:

"The plaintiff contends, however, that she was entitled to notice of the proceedings, and to be heard upon the question *before* it was found against her, and that, as she had neither, she has been deprived of her property without due process of law, in violation of constitutional guaranty, and is therefore entitled to the protection of the court against an unwarrantable invasion of her right. This claim, however, is unsupported by authority. Health Dept. of City of New York v. Rector, etc., of Trinity Church, 145 N. Y. 32, 39 N. E. 833; People v. Board of Health of City of Yonkers, 140 N. Y. 1, 35 N. E. 320; Fire Dept. v. Gilmour, 149 N. Y. 453, 459, 44 N. E. 177.

"*It rests upon the mistaken assumption that the determination of the health authorities is final and conclusive. The jurisdiction of the board depends upon the existence of the nuisance, and that is always open to judicial inquiry, even though the property owner may have had a hearing before the board on the subject.* Health Dept. v. Rector, page 48, 145 N. Y., and page 848, 39 N. E., where the whole subject is elaborately discussed. Even the act under which the defendant proceeded in this case does not assume to do more than to declare that the orders of the health board are to be treated as 'prima facie just and legal.' While the judgment of the board upon the question is entitled to great weight, and will not be disturbed if it is within the bounds of reason, its reasonableness is still open to inquiry in any judicial proceeding, either civil or criminal, in which it may be called in question. *But where sufficient grounds exists for action, the latter* may be summary and without 'due process of law,' as that *phrase is commonly understood.* Lawton v. Steele, 119 N. Y. 226, 23 N. E. 878.

"In the case cited the court, after reviewing the cases upon the subject, says (page 237, 119 N. Y., and page 880, 23 N. E.):

'These authorities sufficiently establish the proposition that the constitutional guaranty does not take away the *common-law right* of abatement of nuisances by summary proceedings without judicial trial or process.'

* * *

"In other words, the deprivation of which the plaintiff complains continues *only so long as the conditions exist* which justified the order in the first instance, and the plaintiff, therefore, is not aggrieved, on constitutional or other grounds, by the operation of repressive measures essential to the abatement of the nuisance, *for such repression can continue* only so long as the occasion for it exists.

* * *

"*The first step is the order such as was made in the first instance in this case. It is injunctive in form, and in contemplation of law suspends the occupation of the property while the grounds for complaint exist.* The owner may remedy the evil, and when he shall have done so he will be relieved from the order. Should this not be done or be impossible, the board may follow up the first order by a second one, which by statute is predicated upon the former, declaring the mischief irremediable and condemning the building. Where the owner does not assent to the removal, the board must avail itself of the remedy by which the condemnation is legally accomplished, and the amount of compensation to be made to the property owner is ascertained, and in that proceeding the existence of the jurisdictional facts, namely, 'the necessity of such

destruction,' must be tried and determined on the demand of the owner.

"We have thus, when the action of the board is to be *conclusive* upon the rights of the owner, ample provision for notice and a judicial hearing before such action becomes final; and, if the decision of the court is adverse to the board, the property owner is free from the operation of the second order, and, as we have seen, may disburden himself of the first by remedying whatever evils may justify its continuance. As the power conferred upon the board is necessary for the protection of the public health, and must, therefore, be susceptible of immediate and untrammeled exercise, as the exigency of the case may require, the statute is quite as considerate of private right as it should be, and fully meets the demands of justice. It is clearly constitutional, and the court will refrain from interfering with its operation except in cases where an abuse of authority is manifest." (Emphasis added)

See also *North American Storage Co.* v. *Chicago, supra, Lawton* v. *Steele, supra, City of Salem* v. *Eastern Railroad Company,* 90 *Mass.* 431 (1868), *City of Newburgh* v. *Park Filling Station, supra, Shedrick* v. *Board of Health of Consol. Dist.,* 121 *N.Y.S. 2d* 83 (*Sup. Ct. Steuben Cty.* 1953). As said in *City of Salem* v. *Eastern Railroad Company, supra,* at page 443:

"Although notice and opportunity to be heard upon matters affecting private interests ought always to be given when *practicable,* yet the nature and object of these proceedings are such that it is deemed to be most for the general good that such notice should not be essential to the right of the board of health to act for the public safety. *Delay* for the purpose of giving

notice, involving the necessity either of public notice or of inquiry to *ascertain who are the parties whose interests will be affected, and further delay for such hearing as the parties may think necessary for the protection of their interests, might defeat all beneficial results from an attempt to exercise the powers* conferred upon boards of health." (Emphasis added)

The court further held, at page 447, that:

"* * * in a suit to recover expenses incurred in removing a nuisance, when prosecuted against a party on the ground that he caused the same, but who was not heard, and had no opportunity to be heard, upon the questions before the board of health, such party is not concluded by the findings or adjudications of that board, and may contest all the facts upon which his liability is sought to be established."

But the right to summarily abate a nuisance is not without limitations. The right is based upon necessity, and the necessity must be present to justify its exercise. 39 *Am. Jur.* 455-7, *Nuisances,* § 184, *State, Avis, Prosecutor* v. *Vineland,* 56 *N.J.L.* 474 (*Sup. Ct.* 1894), *Hutton* v. *Camden, supra.* The remedy must be confined to what is necessary to abate the nuisance and no more injury must be done to the rights of individuals than is necessary to accomplish the abatement. 39 *Am. Jur., supra,* 25 *Am. Jur.* 317, *Health,* § 40. Thus here, had defendants attempted to destroy this building, undoubtedly the threat would be enjoined pending a hearing as was done in *Vanderhoven* v. *Rahway,* 120 *N.J.L.* 610 (*Sup. Ct.* 1938) and *Rosenberg* v. *Sheen,* 77 *N.J.Eq.* 476 (*Chan.* 1910) which cases are cited by plaintiff in support of his argument. Defendants here have, from the very beginning of this controversy expressly abjured any intent to destroy the building.

The limitations above mentioned are nothing more than the application of the rule of reason to officials' actions in abating a nuisance, considering the method employed and the nuisance to be abated. It is in that context that some decisions require that an "emergency" exist before summary abatement may be effected. What are the circumstances of the particular case and how drastic is the method which is employed to abate? In the case of a threatened destruction of a building the injury to the owner, if no nuisance in fact exists, is irreparable once the building is destroyed. That was the situation in *Vanderhoven* v. *Rahway* and *Rosenberg* v. *Sheen*. In those cases there was no imminent continuing threat to health or safety which required summary action. The "necessity" did not exist. Here unsanitary and unsafe conditions had persisted from July 8 to November 9, 1966. Every moment of continuous exposure of the occupants to the unsanitary conditions, and to the hazards of fire constituted a danger to their health and safety. The method used—to vacate and remove the occupants from the risk—was reasonable and was not more than was necessary to accomplish the end sought.

Plaintiff had been given ample opportunity to correct the unsanitary and unsafe conditions existing in the building. Despite several notices to correct the conditions he remained adamant and did practically nothing. Finally he was charged and found guilty in the Magistrate's Court: The fact that defendants had been patient in seeking compliance did not remove the necessity to finally vacate the premises. Further delay would only compound the evil and might defeat the beneficial results from an attempt to save the occupants of the building from further exposure to the unsanitary and unsafe conditions existing as of November 9, 1966. See *City of Salem* v. *Eastern Railroad Company, supra*, 25 *Am. Jur.* 315, *Health* § 38.

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Appendix A.

A direction by health authorities to correct conditions which constitutes a nuisance is not a denial of due process. This is at least so when the requirement of the order is not unreasonable. *Health Department of City of New York* v. *Rector, &c. of Trinity Church, supra.* "The improvement of work must, in itself, be a reasonable, proper, and fair exaction, when considered with reference to the object to be attained" (*idem*, 20 p. 836).

As said above, this is not a case wherein the defendants have ordered the destruction of plaintiff's building as in *Vanderhoven* v. *Rahway, supra,* and *Rosenberg* v. *Sheen, supra.* Nor is it a case where defendants have absolutely prohibited plaintiff from the use and enjoyment of the premises as, for example, in *Weil* v. *Ricord, supra.* As said in *Manhattan Manufacturing and Fertilizing Co.* v. *Van Keuren, supra:*

> "It may be lawful to purge premises of a nuisance, and unlawful to burn or destroy them. How much force, or what kind, may be permissible in abating it, is obviously a different inquiry from the permissibility of any."

In *Weil* v. *Ricord,* it was held that defendant authorities had a right to summarily abate a nuisance while the premises were being conducted as such, but that they had no right to "absolutely prohibit" future use of the premises when the business therein conducted was not in fact a nuisance. In those cases where complete destruction of the building is ordered or absolute prohibition of future use is ordered there results irreparable harm against which equity would grant an injunction. *Weil* v. *Ricord* is authority for the proposition that where interruptions of a business are "reasonably necessary to enable (the authorities) to abate any nuisance" such reasonable interruptions may be accomplished in a summary fashion without notice

or hearing. All plaintiff had to do here to regain the use and financial avails of this tenement house was to comply with directions of the defendant authorities by correcting the conditions which the court here finds to have been in fact a nuisance. That is an interruption reasonably necessary to abate the nuisance for the time. Much like a person who is in civil contempt plaintiff here had "the keys in his own pocket." The abatement here effected by vacating the building thus was not a "taking" without due process. It was simply the prevention of its unlawful and noxious use. *Manhattan Manufacturing and Fertilizing Co.* v. *Van Keuren, Health Department of City of New York* v. *Rector, &c. of Trinity Church* and *Thornton* v. *Chase, supra.* The deprivation of which plaintiff complains continues only so long as the conditions exist. He may remedy the conditions, or not. If upon trial it were to be proved that the place was not in fact a nuisance, defendants, having acted summarily at their peril, would be held responsible. This court has determined that the subject building, in the condition described, was in fact a public nuisance, and the defendants' actions were justified.

Judgment for Defendants. Submit order in accordance with *R.R.* 4:55-1.

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Appendix A.

JUDGMENT

(Filed 10/2/68)

This action came on for trial before the Court sitting without a Jury on May 20, 21, 22 and June 25, 1968, and the Court having heard the evidence and the argument of the attorneys for the respective parties, and being of the opinion that judgment should be entered on the merits in favor of the defendants, The Township of North Bergen and Milton J. Muss:

It is, on this 27th day of September, 1968, ordered that judgment be entered dismissing the complaint of the plaintiff, Bertha Hoffman; and plaintiff Aram Ajamian having refused to consent to form of this judgment; and

It is further ordered that judgment be entered in favor of the defendants, The Township of North Bergen and Milton J. Muss, and against the plaintiff, Aram Ajamian, without costs.

John F. Lynch /s/
JOHN F. LYNCH J.S.C.

I hereby consent to the within Judgment as to form.

Aram Ajamian /s/
ARAM AJAMIAN, Attorney
for Bertha Hoffman and
Pro Se

APPENDIX B

(NOT FOR PUBLICATION WITHOUT APPROVAL OF COMMITTEE ON OPINIONS)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-342-68

ARAM AJAMIAN,

Plaintiff-Appellant,

and

BERTHA HOFFMAN,

Plaintiff,

v.

THE TOWNSHIP OF NORTH BERGEN and MILTON J. MUSS,

Defendants-Respondents.

Argued September 23, 1969—Decided Oct 2 '69

Before Judges Kilkenny, Labrecque and Leonard

On Appeal from Superior Court, Law Division, Hudson County.

Mr. Aram Ajamian argued the cause for appellant *pro se.*

Mr. Nicholas S. Schloeder argued the cause for respondents.

Appendix B.

PER CURIAM

The judgment is affirmed essentially for the reasons stated by Judge Lynch.

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MORTIMER G. NEWMAN JR.
Clerk.

APPENDIX C

SUPREME COURT OF NEW JERSEY

M-141 September Term 1969

ON MOTION TO
DISMISS APPEAL

Aram Ajamian,
Plaintiff-Appellant,

vs.

Township of North Bergen, et al,
Defendant-Respondent.

This matter having been duly presented to the Court, it is Ordered that the motion to dismiss appeal is granted.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this 10th day of February, 1970.

JOHN H. GILDEA,
Clerk.

Filed
Feb 10 1970
John H. Gildea
Clerk

A True Copy

John H. Gildea
Clerk

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1541

ARAM AJAMIAN,

Petitioner,

vs.

THE TOWNSHIP OF NORTH BERGEN IN THE COUNTY OF HUDSON, and MILTON J. MUSS,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

I

Objection to Jurisdiction

The respondents object to the jurisdiction of this court because the State court has neither decided a federal question of substance not heretofore decided by the court, nor decided it in a way probably not in accord with applicable decisions of this court.

While the refernces to the official and unofficial reports of the opinions delivered in the courts below are correctly referred to and appended to the Petition, the statement of the questions presented for review, as well as the statement of the case, contain allegations which are not supported by the record below, many of them being in direct conflict with the expressed findings of the trial court in the Opinion annexed to the Petition as Appendix A, and, in particular, pages 53a to 57a of the said Petition. The Court's conclusion as to the facts is succinctly stated in its Opinion, as follows:

> "The court finds that this building, in the conditions described, constituted a 'public nuisance'." (56a)

A question of fact is thus presented which does not raise a federal question, otherwise every defeated litigant could claim that he has been victimized by lack of due process. For instance, the trial court's Opinion, Appendix A, and in particular pages 55 *et seq.*, indicates that Petitioner, over a period from July 8, 1966 to November 8, 1966, received repeated notices from sundry Township officials, and that his so-called "forcible closing of an apartment building by a 24 hour notice without a hearing or opportunity for a hearing", which is referred to throughout the Petition, as the prime basis for his alleged constitutional question, is based, not on fact, but fiction.

Furthermore, his Petition otherwise fails to comply with Rule 23 in that it is so discordant and repetitious that it can hardly be said to contain a concise statement of the case containing the facts material to the consideration of the question presented as required by subdivision (e), nor a direct and concise argument amplifying the reasons relied on for the allowance of the writ.

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To illustrate, under the Petitioner's heading "Questions Presented for Review", page 3, Petitioner expresses question No. 6 as follows:

> "6. Whether the totality of the effect of the New Jersey Administrative proceeding and the failure of the New Jersey Courts to scrutinize and relieve the impact of it deprive petitioner of property without due process of law."

The meaning of this question is obscure, but the Petitioner elucidates it under his Point VI on page 47a of the Petition, and better than anything else, it is a fair reflection of the Petition and its merits. Hence, it will be repeated here in full:

> *"Reasons for granting the writ.*
>
> The trial Court in case of prerogative writ as in this case, sits appellative tribunal to see if constitutional question is involved in regards to procedure to see if petitioner is deprived of his constitutional rights. The Appellate Division upheld the trial Court without an opinion of its own, stating for the reasons of the trial court. The Supreme Court dismissed the appeal to its Court by the Chief Justice without a hearing.
>
> The Courts of New Jersey by depriving this plaintiff of his Constitutional rights just because he is a New York lawyer and not a New Jersey lawyer or to help the officials in power of the Township of North Bergen for political reasons, or because the Judges sitting in this case knew or are personal friends of the Township attorney.
>
> The presiding Judge of the Appellate Division had a conflict of interest having been the Administrator for creditors heretofore when he was a

lawyer, and when he had charge of this apartment building and his excessive fee was opposed by this petitioner.

This decision is doing great harm to the property owners of New Jersey and to all property owners of the United States, because this decision of the highest court of New Jersey may now be used any official as the law of New Jersey—the law of the land—summarily close up by 24 hour notice without any opportunity to be heard, any business and building just because the official does not like its owner for political reason, money gain to himself or for any other personal reason." (47a)

This scandalous summation, wholly unsupported by anything in the record, or otherwise, should be sufficient, under Paragraph 4 of Rule 23 of this court, to require a denial of his Petition.

However, the Respondents will attempt to extract from this Petition the grounds upon which the Petitioner appears to rely upon and meet these grounds on their merits.

POINT I

The action below was a proceeding in lieu of prerogative writ seeking to review the action of the Township officials and no jury trial is obtainable in such action.

For more than a century, under the New Jersey Constitution of 1844, the courts of New Jersey had reviewed acts of public officials by the Writ of Certiorari, without a jury. In 1947, prerogative writs were superseded, and in lieu thereof, hearing was to be afforded in the Su-

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perior Court in the manner prescribed by the Supreme Court, Article 6, Section 5, Paragraph 4.

The Rules of the New Jersey Supreme Court provide:

"4:88-2. Action in Law Division

Review, hearing and relief heretofore available by prerogative writs and not covered by Rules 4:88-7, or 4:88-8, or 4:88-10 shall be afforded by a civil action at law in the Law Division of the Superior Court. Such action shall be tried before a single judge without jury, except in any case where a jury trial would have heretofore been available and demand therefor is filed within 10 days of the service of the complaint."

The reference in the Rule to the clause "where a jury trial would have heretofore been available", refers only to the prerogative writs of mandamus and *quo warranto,* but not certiorari, since in certiorari a jury trial would not have heretofore been available. Even in mandamus such right is no longer available. See *O'Neill* v. *State Highway Department,* 40 N. J. 326 (S. C. 1963), 191 A. 2d 48.

Petitioner never demanded a jury trial and selected a forum where no jury trial was available.

The Constitution of New Jersey, like the United States Constitution, recognizes the right to a jury trial in certain instances, but long ago it was decided by this court that "it is a mistaken idea that due process of law requires a plenary suit and a trial by jury, in all cases where property or personal rights are involved". *Ex Parte Wall,* 107 U. S. 265, at page 289. It refers to courts of chancery, bankruptcy, probate, admiralty, etc., and concludes with the observation:

"In all cases, that kind of procedure is due process of law, which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts."

POINT II

No constitutional rights of Petitioner were invaded in the abatement of the nuisance herein complained of.

The record amply established the existence of a nuisance, which, both under the laws of New Jersey and the common law, was subject to summary abatement.

The Petitioner's complaint appears to be grounded on (a) lack of notice, and (b) denial of hearing.

(a)

The Petitioner had more than enough notice. The record itself, as well as the trial court's findings, clearly disclosed the Petitioner was given ample opportunity over a period of four months to abate the nuisance resulting from the intolerable conditions which existed in this tenement house.

During this period he contumaciously refused to remedy the conditions and the vacation of the premises was a last resort, since, as pointed out by the trial court, there was no intention to demolish the building. If, as Petitioner claims, it has since deteriorated, that is due solely to the Petitioner's desire to vindicate his "constitutional rights" rather than make the premises habitable.

(b)

The Petitioner has had a full hearing on the merits, which is all that he was entitled to. As the trial court

was careful to point out, the proceedings did not involve the demolition of his building which would be irrevocable, but rather its temporary vacation pending such corrective measures as would abate the nuisance.

It is elementary that the exact point in the proceedings when the hearing takes place raises no constitutional question, and it is at most a question of procedure. *Utley* v. *City of St. Petersburg,* 292 U. S. 106; *Ewing* v. *Mytinger and Casselberry,* 339 U. S. 594.

This is especially true in the case of public nuisances and the compelling necessity of abating same, in the interest of the public health and safety, at the earliest possible moment, leaving to the party allegedly injured by such action, his redress at a subsequent hearing, if indeed he is entitled to such redress.

The situation here is in fact controlled by the case of *North America Storage Co.* v. *Chicago,* 211 U. S. 306, which incidentally, the trial court cites in support of its determination (68a).

An exhaustive four-day trial on the merits showed that Petitioner was not entitled to any redress. The Petitioner's reference to the inviolability of contracts, or the more subtle and recent concept of "vested rights" under the due process clause of the Fourteenth Amendment, are not even remotely involved. No court, federal or state, has ever said that anyone has a vested right to continue a public nuisance.

The reference by the Petitioner to the National Building Code, which embraces the Electrical Code adopted by the Township of North Bergen in 1966, is difficult to understand, since the trial court itself did not make the requirements of this Code the basis of its decision. In fact the trial court expressly observed:

> "Since the subject building was erected many years before 1966, it cannot be said that the National Building Code may be used as authority for the summary action taken herein. Nor can defendants rely on plaintiff's failure to appeal to the Board of Appeal provided by Sec. 107.6 of that code, as constituting a waiver of a right to a hearing." (57a)

Finally, other tangential references to unequal application of the local laws, or the taking of private property for *public use*, without compensation, are so removed from any established fact in this case as to require no further discussion.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

NICHOLAS S. SCHLOEDER,
Attorney for Respondents.

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JUN 4 1970

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1541

ARAM AJAMIAN,

Petitioner,

v.

THE TOWNSHIP OF NORTH BERGEN, and MILTON J. MUSS,

Respondents.

PETITIONER'S REPLY BRIEF AND ADDITION OF CASE TO PETITION FOR WRIT OF CERTIORARI RENDERED BY THIS COURT AFTER THE PETITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1541

ARAM AJAMIAN,

Petitioner,

v.

THE TOWNSHIP OF NORTH BERGEN, and
MILTON J. MUSS,

Respondents.

PETITIONER'S REPLY BRIEF AND ADDITION OF CASE TO PETITION FOR WRIT OF CERTIORARI RENDERED BY THIS COURT AFTER THE PETITION

Reply to Respondents' Objection to Jurisdiction of the Petition

The respondents state at page 2:

> "The trial court's opinion, Appendix A, and in particular pages 55 et seq., indicates that Petitioner, over a period from July 8, 1966 to November 8, 1966, received repeated notices from sundry Township officials and that his so-called 'forcible closing of an apartment building by a 24 hour notice without a hearing or opportunity for a hearing, which is referred to throughout the Petition, as the prime basis for his alleged constitutional question is based, not on fact, but fiction.' "

The petitioner's Brief page 14 reputes this anticipated statement of the respondent as stated on page 14:

The Court after stating (298a-24):

> "naked notice not enough constitutionally necessarily implies an opportunity to be heard before his property is taken without due process of law."

And at pages 5, 6 and 7 of the petition appears:

But, this was not the issue the Court was to pass upon. The Court was to pass upon and decide if the proceeding of the Building Inspector should be set aside to close the building, because he had not complied with the requirements of the New Building Code in regards to notice and opportunity to be heard, depriving plaintiff of due process of law, by his summary action on November 9, 1966 of closing the building by 24 hour notice given to this plaintiff and each of the tenants of the apartment house building, and a request that the proceeding of the Building Inspector be set aside closing the building, and that the plaintiff be allowed to open up the closed building, and thereafter, the Building Inspector, if he still wanted to proceed against the petitioner to give the petitioner the notice and hearing before the Commissioners as the code required him to do. After the determination by the Commissioners, if it should be against the plaintiff, he would be given 30 days opportunity to comply. The plaintiff thereafter has several choices one of which is to do nothing and allow the Township to demolish the building and sue the Township for damages to be assessed by a jury, which right the Court, by its decision, took away from this plaintiff. *Hutton* v. *Camden,* 39 N.J.L. 122, 23 AM, Rep. 203 (1876).

The Trial Court's opinion (41a) states: "to account for the same" and "to show that the alleged nuisance was not one in fact" neither of which was necessary to

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be shown by the "in lieu of prorogative writ" as stated in *Coast* v. *Borough of Spring Lake,* 56 N.J.E. 615, 623, 624, 36 A 21 affirmed, 58 N.J.E. 586, 47 AT 1131, E & A 1897 "and it is not a fact that otherwise any public officer by pretense of summary abatement, throw person into "in lieu of prorogative writ", forcing the person to be deprived of guaranteed right of jury trial. "If the Court's decision were to remain, this plaintiff would be deprived of jury trial." Everything was taken care of except the electrical work (411a to 15) which could not possibly be done except by the complete destruction of the apartment house.

In any event the building inspector could not summarily abate a nuisance when the Township had given such power only to the Board of Health, Court's opinion (49a).

The Court having decided that the building inspector had not complied with the building code (35a) in not giving notice and hearing to plaintiff, said fact being admitted by the defendant, should have set aside the building inspector's proceeding in closing up the building summarily for the purpose of abating a nuisance.

The Court having decided that the National Building Code which embraced the Electrical Code, adopted by North Bergen in 1966, did not apply to this plaintiff's building because the code specifically stated it was to be applied only to buildings after the adoption of the code, and the Court having decided said building was built long prior to said code, nevertheless found the cables in the walls (102a-23; 103a-1 to 13; 104a, 16-17; 107a-14; 253a) not complying with the National Building Code (185a, 13-1; 186a-24) nevertheless should be made to comply with said code by tearing the building apart as above stated.

and at page 28 appears:

Hill Military Academy v. *City of Portland,* 53 P. (2) 55, 152 or 272 (1936). The facts in the *Hill* v. *Portland*

case is nearly exactly the same as this plaintiff's at page 58: "2, 3). "It is plain that the council proceeded first to condemn the building as unsafe and a nuisance, and then changed and declared it a fire hazard."

"That said Hill Military Academy, a corporation has failed to remove said fire hazard and failed to make the necessary repairs to said building requisite for safe occupancy for school purposes. The Council, therefore, directs that the further use or occupancy of the building known as No. 2468 N. W. Northrup Street, situate on the real property hereinabove described, shall cease, and the bureau of Fire is hereby directed, to abate the further use and occupancy of said building and the Commissioner in charge of said bureau is hereby granted authority to close said building and to prevent its further use and occupancy, until such time as the Hill Military Academy, a corporation shall repair and put in a safe condition in accordance with the Building Code, said building. While we do not deem it absolutely necessary, we will refer to the condition of the building, as it may have a bearing on the case. The following cases are instructive upon the questions involved:"

Grossman v. *City of Oakland,* 30 Or. 478, 41 P. 5, 36 L.R.A. 593, 60 Am. St. Rep. 832; *Ex parte Wygant,* 39 Or. 429, 64 P. 867, 54 L.R.A. 636, 87 Am. St. Rep. 673; *Daniels* v. *City of Portland,* 124 Or. 677, 684, 265 p. 790, 59 A.L.R. 512; *Why* v. *City of Marshfield,* 138 Or. 167, 5 P. (2d). For the reasons stated herein, the decree of the circuit court is affirmed."

At pages 25 and 26 of the petition appears:

N.J.S.A. 40:48-1 in Court's opinion on page 9, outlines the procedure. *Vanderhohen* v. *Rahway,* 120 N.J.L. 610, 1AT (2nd) 303 (1938).

> Notice must be given whether or not required by statute.

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The Appellate Court states:

> "There can be no question of the right of the State, or of its right to delegate the power to a municipality, to exercise its police power to take or destroy private property in a summary manner when necessary for the safety of the public. But the necessity for such action must be caused by an emergency which requires prompt action for public protection. For example, the immediate need for taking and destroying unfit food being offered for sale to the public or the immediate need for the destruction of buildings for the purpose of stopping or controlling a conflagration.
>
> In the instant case, however, there existed no emergency nor need for prompt action. In fact, nearly seven months elapsed from the time the building inspector reported that the buildings were in such dilapidated condition that they should be demolished and any action whatever being taken by the Common Council."

The original request in this plaintiff's action was also months ago not by the building inspector but the Board of Health (Exhibit 5) only to whom summary action was given. The building inspector was not given the police power of summary action, but had to follow the procedure of this building code as above.

POINT I

The following is a reply to Point I of the respondents' brief.

O'Neill v. *State Highway Department*, 40 N. J. 326 (S. C. 1963) 191 A (2) 48, the plaintiff had a choice between prerogative writ of mandamus and an action for damages with a jury trial, whereas this petitioner had no choice, but was compelled into a prerogative writ of cer-

tiorari, where there was no jury trial by rule 4:88-2. The petitioner did not ask for a jury trial because rule 4:88-2 stated there was no jury trial. The petitioner's prerogative writ of Certiorari did not ask a review of the facts as above stated but just that whether notice was given and whether petitioner had an opportunity to be heard, as required by the United States Constitution, the New Jersey Constitution, and the North Bergen Building Code.

O'Neill v. *State Highway,* the New Jersey Supreme Court which adopted the dissenting opinion of the Appellate Division 191 A (2) 48, states at page 133 of the Atlantic Report:

> "The court could not proceed to a final determination on the merits, against the objection of a party who might choose to relitigate the factual issues before a jury."

Ex Parte Wall, 107 U. S. 265 at page 289 quoted by respondent saying the court concludes with the observation but fails to state the addition following the above conclusion which is as follows on page 289.

> "Perhaps no definition, says Judge Cooley, is more often quoted than that given by Mr. Webster in the Dartmouth College case: 'By the law of the land is most clearly intended the general law; a law which hears before it condemns'."

and on page 290 appears:

> "We have seen that, in the present case, due notice was given to the petitioner, and a trial, and a hearing was had."

In the above case quoted by respondent there was due notice and a hearing. In this petitioner's case there was no notice or hearing.

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As stated heretofore by the cases of *Hutton* v. *Camden*, 39 N.J.L. 122, 23 A. M. Rep. 203 (1876), *Coast* v. *Borough of Spring Lake*, 56 N.J.E. 615, 623, 624, 36 A 21, affirmed 58 N.J.E. 586, 47A-1131 E & A 1897, wherein both highest Courts of New Jersey state that unless the preceding of the building inspector is vacated than as stated by the Courts "and is it not a fact that otherwise any public officer by pretense of summary abatement, throw person "in lieu of prerogative writ" forcing the person to be deprived of guaranteed right of jury trial."

POINT II

The following is a reply to Point II of the respondents' brief.

Replying to Point II (a) respondent states "the petitioner was given ample opportunity over a period of four months" referring to notices given by the inspectors to do various work. Petitioner's brief at page 14 states in regard to these notices:

The Court, after stating (298a-24):

> "naked notice not enough constitutionally necessarily implies an opportunity to be heard before his property is taken without due process of law"

should not the Court have refused to set aside the proceedings of the building inspector to close the building.

Petitioner's brief at pages 25 and 26 states as heretofore above stated.

Replying to Point II (b) of respondent's brief:

Utley v. *City of St. Petersburg*, 292 U. S. 06, the Petition was given notice and an opportunity to appear at the hearing but did not appear.

The Court: at page 109 states:

> "It is enough that a hearing is permitted before the imposition of the assessment as a charge upon the land (Chicago, M. St. P. & P. Ry. Co. v. Risty, 276 U. S. 567; Londoner v. Denver, 210 U. S. 373, 378; Goodrich v. Detroit, 184 U. S. 432, 437), or in proceedings for collection afterwards. Hagar v. Reclamation District No. 108, 111 U. S. 701; Winona & St. Peter Land Co. v. Minnesota, 159 U. S. 526, 537; Wells, Fargo & Co. v. Nevada, 248 U. S. 165."

and at page 111:

> "Finally, the appellants are barred, or so the Supreme Court of Florida has held, by laches and estoppel. They stood by without opposition while the property was improved. They refrained from making use of remedies, both administrative and judicial, that were ready to their call. For nearly five years they held aloof without word or act of protest, and then invoked the aid of equity. Following Abell v. Boynton, 95 Fla. 984; 117 So. 507, and other state decisions, the Supreme Court of Florida withheld an equitable remedy from suitors who had slept upon their rights."

Ewing v. *Mytinger and Casselberry,* 339 U. S. 594, in no way relates to that of this petitioner's case involving misbranding of food articles—vitamins. The following quotations show how unrelated that case is to that of this petitioner's case.

The Court states at page 600:

> "For all we know, the most damage may come from misleading or fraudulent labels. That is a decision for Congress, not for us. The decision of Congress was that the administrative determination to make multiple seizures should be made without a hearing."

And at pages 601 and 602 appears:

"The purpose of the multiple seizure provision is plain. It is to arrest the distribution of an article that is dangerous, or whose labeling is fraudulent or misleading, pending a determination of the issue of adulteration or misbranding."

"Congress weighed the potential injury to the public from misbranded articles against the injury to the purveyor of the article from a temporary interference with its distribution and decided in favor of the speedy, preventive device of multiple seizures. We would impair or destroy the effectiveness of that device if we sanctioned the interference which a grant of jurisdiction to the District Court would entail. Multiple seizures are the means of protection afforded the public. Consolidation of all the libel suits so that one trial may be had is the relief afforded the distributors of the Articles."

The respondent cites as its strongest case *North American Storage Co.* v. *Chicago*, 211 U. S. 306. This case involves the destruction of food poultry unfit for human consumption as the court states at page 320:

"We think when the question is one regarding the destruction of food which is not fit for human use the emergency must be one which would fairly appeal to the reasonable discretion of the Legislature as to the necessity for a reasonable discretion of the legislature as to be necessity for a prior hearing, and in that case its decision would not be subject for review by the courts. As the owner of the food or its custodian is amply protected against the party seizing the food, who must in a subsequent action against him show as a fact that it was within the statute, we think that due process of law is not denied the owner or custodian by the destruction of the food alleged to be unwhole-

some and unfit for human food without a preliminary hearing."

And at page 316, the court states that this petitioner is entitled to a jury trial, which this petitioner was denied and further quotes the often cited case of *Lawton* v. *Steel*, 152 U. S. 133 at pages 316 and 317:

"In such cases burden would be upon the defendant to prove a justification under the statute. As was said by the Supreme Court of New Jersey, in a similar case (Am. Print Works v. Lawrence, 21 N. J. Law, 248, 259): 'The party is not, in point of fact, deprived of a trial by jury'."

This petitioner was deprived of a jury trial.

POINT III

Delay of justice is denial of justice.

State of Florida v. *Robert Dean Dickey*, the decision of which does not as yet appear in the last report of May 18, 1970 states as appears in the Daily News of May 26, 1970 on page 8:

"Washington, May 25 (News Bureau)—The Supreme Court overturned the robbery conviction of a Florida man today on the ground that an eight-year delay between his arrest and trial was an 'intolerable violation of his rights.'

The court unanimously ordered the State of Florida to release Robert Dean Dickey, who was sentenced to 10 years in prison after his convicitions in 1968 for an armed robbery in 1960.

Witnesses Unavailable

Chief Justice Warren E. Burger noted that during the eight-year interval two potential witnesses died, a

third became unavailable and police records were lost or destroyed. He declared 'the right to a speedy trial is not a theoretical or abstract right but one rooted in hard reality on the need to have charges promptly exposed.'

Burger noted that Dickey, who repeatedly sought a speedy trial, was in federal prison serving time for bank robbery and was available for trial by the state during the entire period.

Burger wrote. 'Here, however, not valid reason for the delay existed.' "

On page 18 of the petition appears "when it finally came for pre-trial, before Judge Lynch, he refused to pre-try it, and the case was sent back to the assignment Judge who said that he had from the beginning assigned the case to Judge Lynch and Judge Lynch must dispose of this case.

In this petitioner's case during the unauthorized delay of two years by Judge Lynch, six witnesses; namely, the six tenants that were forcibly ejected by 24 hours notice disappeared—there where-abouts became unknown to the petitioner. According to the rules "in lieu of prerogative writs" cases are not pretried, but brought to trial immediately, before all other cases like dispossess cases putting out a tenant for non-payment of rent. Judge Lynch knew that other Judges of the Court, as he stated in his opinion, on the motion of petitioner. For restraint, two years ago and in the alternative for an immediate trial.

Judge Lynch stated in his opinion of two years ago (78a) this same kind of "in lieu of prerogative writs" in regards to this same house, by this petitioner against the same defendant—the Township of North Bergen—wherein that action was brought to trial immediately and without pretrial and decided against the defendant the Township of North Bergen—resulting in the building not being closed up. The following is what Judge Lynch in his opinion of two

years ago on the foregoing motion said, on page (78a) of the testimony.

78a

"As to defendants, they are to determine what course they deem advisable in the performance of their duties, under the instructions of the corporation counsel of the defendant Township, and pursuant to the procedures outlined in the relevant ordinances of the Township. They are likewise to determine whether or not in fact an 'emergency' exists which warrants summary action, as provided in § 104.5 of the National Building Code, if not, they shall follow the procedure outlined in said Code which may be appropriate to a non-emergent situation, and hold such hearing, or take such steps, as they may be advised by the corporation counsel. Parenthetically, it may be added that the Court gathers from the papers that in the year 1963 such a hearing was had. Plaintiffs' Exhibit 1 appears to be an order by the defendant Muss dated March 15, 1963, following such a hearing."

On pages (225a and 226a) of the testimony shows that in another "in lieu of prerogative writ" by this petitioner against this defendant Township of North Bergen, wherein an injunction was granted as the following shows:

225a

"By Mr. Ajamian:

Q. Mr. Ajamian, was your two houses, each a four-family house, at 51st Street, North Bergen, taken down and violated, regardless of the fact there was an injunction signed by Honorable John J. McGeehan—

The Court: Who is that?

Q. (Continued)—to prevent them—

The Witness: I will introduce it into evidence, your Honor.

The Court: Mr. Ajamian hands me what purports to be an order of the Superior Court, dated March 3rd, 1958, signed by Judge John B. McGeehan, which in essence enjoined the defendants, Township of North Bergen, Angelo J. Sarubbi and Eugene Agresta from interfering with the occupancy or renting of the apartments in certain property described in the complaint, and from demolishing the buildings being known as 1608-1610 51st Street, in the Township of North Bergen.

You offer this in evidence?

The Witness: Yes. And also was that house—

The Court: Wait a minute. Do you offer that in evidence?

The Witness: Yes.

The Court: Let it be marked.

Mr. Bazzani: I object to it going in evidence.

The Court: P-12 for identification, so that he may have his record preserved. I'll sustain the objection to its going into evidence: Let it be marked.

Mr. Bazzani: I also object to this question with reference to that, that he has just concluded on the same points.

The Court: One thing at a time, please. Mark it P-12 for identification.

(Injunction signed by Judge John B. McGeehan marked Exhibit P-12 for identification.)

The Court: Have you finished your question, Mr. Ajamian?

The Witness: In addition to that, the house was taken down.

By Mr. Ajamian:

Q. Mr. Ajamian, was the house taken down after a solemn statement given and taken down by the stenographer that the Township of North Bergen will not take the house down until we had a hearing before the Commissioner and came back into court?"

The foregoing delay by Judge Lynch is more fully explained on pages 16, 17 and 18 of the petition which is as follows:

Delay of Justice is denial of Justice. The trial Judge Lynch, by delaying the hearing of this case for two years has denied justice. The object of the motion for restraining Order or in the alternative for an immediate trial was to prevent the property from being vacated as the defendants had proceeded to do by giving the tenants 24 hours to move out and were bringing the police to accomplish their purpose and this failing were proceeding against the tenants in the Criminal Court where the Magistrate was refusing to give the tenants a hearing, as he knew he had no power to order them to vacate, but instead was accomplishing his purpose by saying to the tenants he was going to put them in jail if they did not vacate the premises and move, and adjourning the trial again and again, although this plaintiff was asking for a trial of the issues to the effect that the Magistrate had no right to order the tenants to vacate. Heretofore, the same Magistrate had decided as to this plaintiff that he had no power to order this plaintiff, as the landlord, defendant in the Magistrate Court to dispossess or move the tenants out and vacate this premises in question. None of the tenants had moved out when the motion was heard by the trial Judge Lynch. All the tenants and the Building Inspector were waiting for the decision of Judge Lynch on this motion for a restraining order or an immediate trial.

The plaintiff's trial brief did not state that the plaintiffs were under the impression that an amiable adjustment

had been made. The following on page 2 of the brief is what was stated:

> "that an agreement was made between the building inspector, Milton J. Muss, whereby he promised to allow one tenant to remain, as a caretaker, so as to prevent destruction by intruders. Even this agreement was breached and the building inspector Milton J. Muss broke his promise. When the only remaining tenant moved out, the building inspector, Milton J. Muss, ordered the Public Service Company to shut off the gas and electric, not only for that apartment, but the entire house, the outlets from the street, and the gas and electric meters removed. The building inspector, Milton J. Muss, refused to allow the Public Service Company to install gas and electric service to the new caretaker tenant who had rented the exact same apartment occupied by the former caretaker tenant who had moved out."

The application was not renewed for restraint because as stated by the Court that it was dismissed upon the case of *Rosenberg* v. *Sheen,* 77 N.J.E. 476, 77A 1019 and *Vanderhohen* v. *Rahway,* 120 N.J.L. 610, 1 (A2) 303, appearing at page (297a) of the testimony, which cases plaintiff had cited in his motion for restraint two years ago at which time the Court stated "there is doubt as to plaintiff's motion to such relief", and there being no way of curing this doubt in the Judge's mind as proved by this decision two years later at the trial there was no use in making the same motion over again resulting in antagonizing the Judge. It was thus clear a new motion would be useless, especially in view of the fact Judge Lynch stated in open Court, that he used to be a Magistrate and that this plaintiff could be proceeded against in the Magistrate's Court and fined $200 a day until he complied. The plaintiff at the argument on the motion had urged that if the motion for the restraint was denied, that the Judge should notice

the case for immediate trial or as soon as he possibly could to prevent the building from becoming vacant and consequently resulting in vandalism and breaking of windows by children. At the same time when the complaint in this law action was filed, an exact complaint was filed at the same time in the Chancery Court in case the action did not belong in the law Court. The case in Chancery having come up long ago was dismissed because the Chancery Court stated it belonged in the Law Court which was given equity power in prorogative writs. However, the Chancery, Judge Matthews stated he would speak to Judge Lynch as actions in "lieu of prorogative writ", were to be tried before other actions. But still there was a delay. When it finally came to pre-trial before Judge Lynch, he refused to pre-try it, and the case was sent back to the Assignment Judge who said that he had from the beginning assigned the case to Judge Lynch and Judge Lynch must dispose of this case. Judge Lynch again delayed in pre-trying it until later, when it was pre-tried and a date set for the trial before him.

The plaintiff did not request that the issue of existence or not of a nuisance be tried by the Court, in fact, the plaintiff not being a New Jersey attorney, would never allow an issue of fact to be tried by the Judge because all things being equal there is a tendency to favor a New Jersey lawyer as against a New York lawyer, who is appearing pro se, especially where a municipality is involved.

"In lieu of prorogative writ", the only way, according to the rules, to proceed in this kind of cases there is no jury trial to which plaintiff is entitled to on question of evidence of a nuisance and the only issue was to set aside the proceeding of the Building Inspector and have him proceed according to the Statute of New Jersey and the Building Code of the Township of North Bergen to give notice and have a hearing before the Commissions of the Township, otherwise plaintiff would be deprived of due process of law.

CONCLUSION

It is respectfully requested that the petition for a writ of certiorari be granted.

Respectfully submitted,

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